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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 388

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, *Petitioner*,

v.

DADE COUNTY, a political subdivision of the State of Florida, and the METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, a governmental entity of Dade County, Florida, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1267, a labor organization, prays that a writ of certiorari issue to review the decision and order of the Supreme Court of Florida, dismissing an appeal from a decision of the District Court of Appeal of

Florida, Third District, overruling petitioner's conflict and preemption objections to a declaratory judgment and injunction issued by the Circuit Court of Dade County, Florida, barring collective bargaining and strikes in the nominally government owned and operated municipal transit system of Dade County.

OPINIONS BELOW

The opinions and orders of the Circuit Court of Dade County, Florida (App., pp. A 19-53, *infra*), are not officially reported. The opinion of the District Court of Appeal (App., pp. A 2-19, *infra*) is reported at 157 So.2d 176. The order of the Supreme Court of Florida (App., p. A 1, *infra*) is not officially reported.

JURISDICTION

The dismissal order of the Supreme Court of Florida was entered May 18, 1964 (A 1). The decision appealed from clearly and unequivocally passed upon and rejected petitioners' constitutional objections and continued in effect the declaratory order and injunction of the trial court (A 19-20, 47-48). The Supreme Court of Florida indisputably "could have taken" petitioners' appeal, and its *sua sponte* dismissal thereof for want of "jurisdiction" consequently amounts to adjudication that the federal questions are "frivolous." *Matthews* v. *Huwe*, 269 U.S. 262, 265 (1925); *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, 22 (1957); *Schermerhorn* v. *Local 1625*, 141 So.2d 269, (1962), aff'd, *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 754-57 (1963), 375 U.S. 96 (1963).

This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether State prohibition of collective bargaining and strikes by employees of a nominally government owned and operated municipal transit system, which is actually privately owned and operated, conflicts with Sections 7 and 13 of the National Labor Relations Act and therefore violates the Supremacy Clause?

2. Whether federal preemption bars a State court from asserting power to decide that the Government exemption applies to and excludes from National Act coverage a municipal transit system which, at least arguably, is in fact privately owned and operated?

3. Whether the bar is removed by the tentative declination of the General Counsel of the National Labor Relations Board to issue a complaint on the theory that the exemption does apply?

STATUTES INVOLVED

Relevant provisions of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. 141, *et seq.*, are set out in Appendix B, *infra*, pp. A 54-58. Pertinent provisions of a Dade County ordinance and of a Florida statute construed below are set out in the opinion of the District Court of Appeal, A 6, n. 3, A 17, *infra*.

STATEMENT

A. Proceedings Below

On November 30, 1961, Dade County and its Transit Authority filed in the Circuit Court of Dade County a complaint for declaratory judgment that immediately upon transfer of title and possession of the municipal transit system from its sole proprietor, W.

D. Pawley, to Dade County, pursuant to certain contracts, a trust agreement and a municipal ordinance, transit employees would lose their right to bargain collectively and to strike (A 3, 5-6; J.A. I, 1-19).[1]

By motion to dismiss (J.A. III, 102) and repeatedly thereafter[2] petitioners urged (A 7, 47) that as long as Pawley or any private investor retains a beneficial interest or actual operating or managerial control the system will remain covered and its employees protected by the National Act;[3] that ostensible County proprietorship without actual full dominion could not divest or defeat coverage; that if the County assumes the role of "employer" without "ultimate control" the County will be subject to the Act; that Florida is forbidden by the Supremacy Clause, by means short of actual, unconditional, immediate, and full government ownership and operation, to outlaw or defeat the federal right to bargain collectively and strike over terms and conditions of transit employment and that Florida

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[1] The six volume Joint Appendix to the briefs of the parties below, which is bound and paginated separately, has been transmitted to this Court by the Clerk of the Court below, and the designation "J.A." herein refers thereto. References to portions of the record not included in the Joint Appendix are designated "R." References to the Exhibits are designated "P" or "D" "Exh.", followed by a number representing the page.

[2] Answer (J.A. III, 115, 126-127, 133-137), oral argument (R. 740-804), petition for rehearing (J.A. V, 221-241); motion to dismiss petition for suplemental injunctive relief (R. 225-253).

[3] The record shows, and the parties stipulated (J.A. IV, 152-154), that the Pawley transit system affects interstate commerce within the meaning of the Act and that the National Labor Relations Board would, under its jurisdictional policy standards, assert jurisdiction over its labor relations. See *Amalgamated Ass'n* v. *Wisconsin Employment Relations Bd.*, 340 U.S. 383, 391-392, notes 13 and 14 (1951).

courts are powerless to sustain the County's claim of immunity under Section 2(2), which provides "[t]he term 'employer' * * * shall not include * * * any State or political subdivision."

The trial court, rejecting the County's contrary contention, found that the contractual arrangements and trust agreement do "in fact" reserve to Pawley a substaintial financial and operating control (A 19-20, 24-25, 28, 37). It held, however, that his financial interest and control does not impair the County's immunity (A 29, 30-31, 35). It construed Section 2(2) as clearly exempting "wholly owned government corporations or 'authorities'" *as such* (A 9, 30, 45, 51, 52-53). Since the Transit Authority is a government entity, it is exempt regardless of private ownership and control of the transit system.

The trial court reasoned that private interest and control over the transit system make no difference because Government immunity to strikes and collective bargaining cannot be divested by implication (A 26, 27, 38, 41-42, 43, 44). It therefore rejected petitioners' contention that Florida Statutes § 839.221(3) (App. A 6, n. 3), should be construed to emplower a County to bargain collectively and leave it vulnerable to strikes when it "takes over" a utility in which the former owner "in fact * * * maintains a substantial financial or operating control." The Court concluded (A 25-26, 39-40, 43-44), that Florida's government-employee labor relations policy applied (*Miami Water Works Local 654* v. *City of Miami*, 157 Fla. 445, 26 So. 2d 194 (1946)) and issued a declaratory judgment and an injunction prohibiting collective bargaining and strikes against the County and Transit Authority as transit employer (A 19-20, 47-48).

The District Court of Appeal affirmed. It held that the record "contains abundant support" for the chancellor's control finding (A 15):

> "because (1) effectual managerial and financial control are in the hands of a management firm and a firm of consulting engineers, the approval of whose appointment by Mr. Pawley was both necessary and obtained; (2) prior to changing these two firms for others, approval of the trustees is required; and (3) Pawley can both remove and appoint the trustees at will. Therefore, through his power to control the trustees, Pawley has a substantial control of the transit system through the management firm and the consulting engineers."

But it sustained the Chancellor's conclusion that such control does not make the transit system or the County as "employer" therein "arguably subject" to the Act (A 9, 13-14). It reached this conclusion by (a) rejecting interpretation of *United States* v. *United Mine Workers*, 330 U.S. 258 (1947) as limiting the Government-employer exemption to enterprises in which Government has "ultimate control" as of right (A 13-14); (b) finding that petitioners had not carried "the burden of demonstrating error" in the Chancellor's construction of Section 2(2) and (c) relying upon the General Counsel's tentative declination to issue a complaint, erroneously describing his reasons as "findings" by the "Board." (A 7-10).

B. The "Purchase and Sale" Transaction

1. Pawley's Retention of Beneficial Interest

The contracts between Pawley and Dade County characterize as an immediate, outright, "purchase and sale" a plan by which the County cannot acquire actual

ownership and control unless and until it pays the agreed net purchase price, five and a half million dollars, entirely out of prospective transit profits. This will take at least fifteen years and perhaps forty or more (J.A. II, 78, D. Exh. FF, 60-62; D. Exh. EE, 28-30). The County cannot shorten the period; it is forbidden by its contract with Pawley to pay any part of the "purchase price" except out of future profits.[4] (J.A. I, 42-43, J.A. IV, 164; P. Exh. 1, p. 4).

The contracts use elaborate legal paraphernalia to conceal the actual locus of beneficial interest and control. The purchase and sale agreement declares that upon taking possession, the County will "operate the properties * * * free of any financial or operating control by Pawley" (J.A. I, p. 48). The Agreement for Delivery of Possession proclaims (J.A. II, 93):

> "2. COUNTY OWNERSHIP. Upon delivery of possession in accordance with the provisions of paragraph 1 of this Agreement, the County shall become the full, absolute and sole owner and operator of said transit system, and W. D. Pawley shall not thereafter have or exercise any financial or operating control over said transit system. The sole rights of W. D. Pawley in respect to said transit system shall consist of the right to receive revenue bonds in payment of the purchase price

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[4] The agreement for sale and purchase explicitly provides (J.A. I, 41-42), "the taxing power of the County shall never be directly or indirectly or contingently involved, and * * * the purchase price of the Companies and all principal and interest on any obligations issued to secure such purchase price, and all operating and other expenses of operation shall be payable solely from the revenues of the transit operations." The agreement for delivery of possession provides (J.A. II, 96): "No county tax funds shall be utilized in any manner in connection with the purchase or operation of said transit system."

> for said transit system as fixed and determined by the existing agreements between the parties, as modified by this agreement, at the time of closing."

The "revenue bonds" referred to are actually certificates of beneficial interest, exchanged for equivalent stock in Pawley's wholly-owned corporations. The County acquires "title" to the transit system by "purchasing" that stock. But immediately upon receiving the stock, the County must "liquidate the transit companies so that title to the assets owned by such corporations shall become vested in the County." (J.A. I, 48; J.A. II, 92-93). Beneficial interest cannot follow the title, for the County neither pays, nor obligates itself to pay, any part of the purchase price. The Trust Agreement (D. Exh. 1, hereinafter referred to by Section number) provides (J.A. V, 198, Section 1306):

> "Nothing in the bonds or coupons or in this Agreement shall be construed as pledging either the faith and credit or the taxing power of the County for their payment, or to create any debt against the County, or as conveying or mortgaging the Transit System or any part thereof."

The County's sole obligation is to operate the transit system in accordance with the provisions of the trust agreement,[5] as long as any of the "bonds" are outstanding. If the County defaults, title and possession necessarily revert to Pawley. Any violation of the Trust Agreement or failure to pay a scheduled bond installment is an "event of default" which entitles the

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[5] This is a bilateral contract between Pawley and the County (P. Exh. 1, p. 123; J.A. II, 98; J.A. IV, 166), which Pawley either drafted or approved (J.A. IV, 166, Tr. 503-507, 523-526, 530-531) and which cannot be changed without Pawley's consent.

holder of a majority of the bonds to have all the bonds declared due and payable at once (Sec. 802).[5a] Since the County can pay up only out of profits, such a declaration guarantees reversion.

"Interest" on the bonds (assumed to be tax exempt) is calculated to provide a return on Pawley's investment equivalent to his former net profit after taxes (D. Exh. EE, pp. 26, 34, 35-38, 40). The bonds are initially scheduled to mature over a fifteen-year period, which may, by agreement, be extended to forty years (Sec. 211). There is no provision for disposition of the transit system if the agreement is not extended or if any bonds remain outstanding after forty years.

2. Pawley's Retention of Control

The Trust Agreement binds the County and the Transit Authority, as long as any bonds are outstanding, to "maintain and operate the Transit System in an efficient and economical manner and in conformity with * * * this Agreement" (Sec. 703); to adopt whatever "ordinances and resolutions are necessary to carry out [their] obligations" thereunder (Sec. 708); not materially to amend the Ordinance establishing the Transit Authority (J.A. V, 196; Sec. 711); to "continuously use their best efforts to obtain and maintain the highest possible volume of business from the ownership and operation of the transit system and [not] voluntarily suspend the operation * * *" (Sec. 712); not to "sell, lease or otherwise dispose of or encumber the Transit System" (Sec. 710); to maintain the system in sound repair (Sec. 703); to keep "the funds

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[5a] Failure is excused, however, "if the Transit Authority shall comply with all of the recommendations of the Consulting Engineers in respect of the rates, fares and charges" (Sec. 502).

and accounts of the Transit System * * * separate from all other funds and accounts of the County or of any of its departments," and to furnish bondholders reports, audits and information (Sec. 709).

The County pledges and assigns all income from the transit system to trustees for the benefit of bondholders (Secs. 505, 601). The money "shall be * * * applied only in accordance with the provisions of this Agreement * * * and shall not be subject to lien or attachment by any creditor of the County or of the Transit Authority" (Sec. 601). The trustees are required to allocate the income to various funds and reserves for equipment replacement, damages, construction, insurance, interest and principal payments, etc., in accordance with detailed specifications in the Trust Agreement or the judgment of the consulting engineers or the management company (Secs. 505-601).

The County and Transit Authority agree that if they default on "any * * * of the covenants, conditions, agreements and provisions contained in * * * this Agreement on the part of the County to be performed" (Sec. 802), they shall be subject to such "suits, actions or special proceedings in *equity* or at law, either for *the specific performance of any covenant contained herein* or in aid or execution of *any power* herein granted or for the *enforcement of any proper*, legal or *equitable remedy* * * *" (Sec. 804) (Emphasis added).

3. The Pervasiveness of Private Control

The Trust Agreement covers every facet of transit policy and management and binds the County as to each. From the outset, the Transit Authority must operate "along the routes of the Transit System which

are presently established by the Companies and * * * will not make any changes in or additions to such routes * * * unless" the consulting engineers recommend such changes as "necessary and desirable" (Sec. 706, p. 84). Before beginning operations the County must "fix and place in effect the rates, fares and charges * * * which are then being charged * * * or such other rates, fares and charges which the consulting engineers shall have certified will not in their opinion produce less net revenues than" (Sec. 501, p. 56) "will be more than sufficient to pay the estimated annual cost of maintaining, repairing and operating the Transit System and the interest on the principal of the bonds" (Sec. 6, par. 3).

The County cannot thereafter "revise any schedule of rates and charges until after receiving the recommendations of the Consulting Engineers" (Sec. 501(d), p. 57). It cannot make any reduction in rates, fares or charges unless, in the opinion of the consulting engineers, the reduction will not produce less revenue than required to meet current expenses, pay interest and principal, and credit reserve accounts (Sec. 502, p. 58). If revenue falls off, the Transit Authority must request the consulting engineers to make a recommendation for revision. As majority bondholder, Pawley is entitled to be kept constantly informed of day-to-day operation of the transit system (Sec. 709, pp. 86-88; Sec. 406, p. 55; Sec. 407, p. 55; Sec. 502, p. 59; Sec. 503, p. 61; Sec. 504, pp. 61-62).

The Transit Authority must follow the recommendations of the consulting engineers with respect to rates, fares and charges for improvements (Sec. 501(b), pp. 56-57); free transportation (Sec. 501(c), p. 57); insurance (Sec. 707, p. 85); construction of the central

garage (Sec. 702, pp. 81-82); and sale of buses, machinery or equipment of all kinds (Sec. 710, pp. 88-89). It must have the consulting engineers make an annual inspection and recommendations for the coming fiscal year with respect to maintenance, repair and operation, insurance, improvements, replacements and renewals, reserves and revisions of rates, fares and charges (Sec. 503, pp. 60-61). From the mangement company it must receive a recommended annual operating budget (J.A. II, 70).

The County is *required* (Sec. 705, pp. 83-84) "for the purpose of performing and carrying out the duties imposed on the Consulting Engineers by this Agreement [to] employ an independent engineer or engineering firm or corporation having a nation-wide and favorable repute for skill and experience in such work. * * *" The agreement provides that before "employing any * * * firm * * * other than the Consulting Engineers (Coverdale & Colpitts) * * * and the management agency (National City Management Co.) who are now employed by the Transit Authority," the Transit Authority must secure "the written approval of the Trustee. * * *" (*Ibid.*, p. 84).

The County is also *required* to employ "a Transit Superintendent or management agency having a nation-wide and favorable repute for skill and experience in such work" (Sec. 705, p. 84). The compensation of the management company is "2.5 percent of the gross revenues derived from the operation" (J.A. II, 67). Before approving the Trust Agreement, Pawley not only knew which company had been retained "to manage and supervise the operation" (J.A. II, 67), subject to all applicable requirements of the Trust Agreement (J.A. II, 70), but that it had arranged to keep his

entire "management team" on the payroll (Tr. 403-405, 408, 504-506). A Transit Superintendent is to be designated by the management agency (J.A. V, 184). Pawley's General Manager, Cuevas, was retained by the management company for this role (J.A. IV, 148-152). Pawley can assure retention of his management team because the "period" of any contract between the County and a management company, "and the terms and conditions thereof, including the amount of compensation to be paid to the contractor thereunder," are "subject to the approval of the Consulting Engineers" (Sec. 1301, p. 115).

As the Court of Appeal found, p. 6, *supra*, Pawley has unfettered power to remove and appoint the trustees at will (Sec. 913, p. 104; Sec. 914, p. 105, Sec. 807, p. 97) and through them controls the management firm and the consulting engineers. The Trustee and Co-Trustee, Consulting Engineers and the Management Company are all paid exclusively out of transit revenues (Sec. 905, p. 101; J.A. IV, 152).

An expert witness testified without contradiction that "there is no principal function of management that remains with the [County or Transit Authority]. It all is in the hands of either the consulting engineers, the trustees, or the management company. The hands of the Transit Authority as such are bound" (J.A. IV, 156; R. 458). County Attorney Davis admitted that under the Trust Agreement the "consulting engineer * * * in fact * * * is running the show * * * and I think rightfully so" (R. 918). According to George N. Shaw, the County's independent financial consultant, "the Transit Authority, an agency of Dade County, has the financial control under the advice and consent, as it were, of the consulting engineer, the management firm,

and the trustees" (R. 658). The Chairman of the Transit Authority, Butler, testified (J.A. IV, 169-170; R. 551-552) that the Transit Authority "could not supervise it. * * * We do not have the knowledge to run a bus line."

The record shows that the powers over management reserved by Pawley and his agent-trustees, the management company and the consulting engineer, are "most unusual * * * for this type of instrument" (J.A. IV, 158-160, 179-181). Even Shaw admitted that he knew of no other revenue bonds issued in ostensible payment for an existing business, and no other Trust Agreement which *requires* the ostensible "owner" to retain an independent management company approved by the ostensible "creditor" to manage the operation (R. 654-655); or which makes the "advice and consent" of an independent engineer a condition precedent "in operating situations and budget" (R. 658-659).[6]

The trial court found (A 37), that since the County was neither to invest any of its funds nor pledge its credit, and, therefore, took no risk of loss, Pawley was naturally unwilling to relinquish to it actual control over his property. Initially, the parties planned to leave the management function to Pawley directly. When, in response (R. 908, 925; J.A. IV,

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[6] "Q. [By Mr. Ratner] Do you know of any comparable bond issue? Are you familiar with any comparable bonds issued under a comparable trust indenture which provides for distribution of a majority of the bonds to be issued to a single bondholder?

"A. [By Mr. Shaw] My answer to that would be no because I don't know of any of my own experience and knowledge of any transactions which have had the situations involved which exist here, where there is a system being acquired and paid by part of the bond issue." (R. 654-655).

173-176), the Florida legislature exempted from its 1959 government-employee, civil service, anti-strike law any public utility "taken over" by a County in which the former owner "in fact * * * maintains a substantial financial or operating control" (Florida Statutes § 839.221(3)), Pawley and the County vested the management function in independent private contractors subject to Pawley's disguised authority (J.A. IV, 173-176).

4. Substitution of Civil Service for Collective Bargaining and the Right to Strike

In 1959, Congress voted down an amendment proposed by Senator Holland of Florida to overrule *Amalgamated Ass'n.* v. *Wisconsin Employ. Rel. Bd.*, 340 U.S. 383 (1951), and empower the States to "regulate or qualify the right of employees of a public utility to strike, or * * * prohibit strikes by such employees." 105 Cong. Rec. 6733-6740. Congress in that year authorized the National Board to cede to the States jurisdiction over certain classes of covered enterprises (Section 14(c)). But it decided that federal law exclusively should continue to govern "all labor disputes involving local public utilities which exert or tend to exert a pronounced impact on commerce." *Sioux Valley Elec. Ass'n*, 122 NLRB 92, 94 (1958). Accordingly, Congress withheld power to cede jurisdiction over any municipal transit system having a gross annual volume of $250,000 or more. NLRB, *Twenty-Third Annual Report* (G.P.O., 1959), p. 8; NLRB, *Twenty-Sixth Annual Report* (G.P.O., 1962), p. 26.

On August 2, 1960, in contemplation of the Miami Transit deal, Dade County adopted its Transit Authority Ordinance, 60-23. The ordinance provides that

upon County acquisition of a transit system its employees "shall be deemed, considered or construed as County employees" (J.A. I, 35), and that current pay scales, seniority, vacation and sick leave rights shall be maintained (A 17).

The role of this provision was explained in the feasibility reports of Coverdale and Colpitts, the consulting engineers, dated March 17, 1961, and September 29, 1961, upon which the transaction was grounded (D. Exh. EE, pp. 20-21): "The nature of the transit business is such that labor cost inherently represents a large portion of the revenue received." Thus, "by far the largest single item of expense is labor payroll, and of this labor cost, the bulk of it is the cost of bus operators." Labor costs must not be permitted to "exceed 55 per cent of the gross revenue * * * if the venture is to meet its financial obligations [to Pawley] * * *." Therefore, "there is a definite limit to expenditure for wages unless there are compensating increases in revenue. This we believe to be fundamental to a successful operation." However, "revenue can only be increased within certain limits before the loss of traffic will offset revenue gains." Under the projected arrangement, the necessary ceiling can be placed on wages because: "It is our understanding that under County ownership the employees of the present companies would become County employees, and as such would not have the right to negotiate labor agreement or to strike."

The Trust Agreement provides that "all compensation, salaries, fees and wages paid by the Transit Authority in connection with the maintenance, repair and operation of the Transit System will be reasonable, that no more persons will be employed by it than are

necessary for the efficient and economical operation of the Transit System" (Sec. 703, p. 83). Thus, the agreement gives Pawley veto power over any future increase in wages or labor costs which would make "labor payroll" exceed "55 per cent of the gross revenue."

Substitution of the County for Pawley in the role of proprietor-employer would enable Pawley to continue to post "earnings records * * * among the best of the American transit industry" (D. Exh. EE, 19). Even if, in the role of "employer", Pawley could successfully resist future strike backed demands for wage increases, strikes would permanently reduce rider patronage. This had happened in 1960 (J.A. IV, 147-148; D. Exh. FF, 54-55; D. Exh. EE, 11, 12, 18), and a demand for a wage increase backed by a threat of a strike was anticipated when petitioners' collective bargaining contract expired in 1961 (D. Exh. EE, 17). The projected tax-free, five per cent return in the form of "interest" on an investment valued at over five million dollars, secured against strikes by nominal County ownership and operation, would be higher than Pawley's anticipated net after tax income as legal owner (D. Exh. EE, pp. 26, 34, 35-38, 40; cf. R. 622-623).

5. Intended Circumvention of the National Labor Relations Act

Characterizing the transfer of title and possession as an "acquisition" (A 28), and casting the County in the role of "employer," was obviously designed to evade collective bargaining and the right to strike (J.A. I, 1-19; J.A. IV, 113-176). Indeed, the County decided to consummate the arrangement hurriedly in order to head off a strike by interposing its assumed gov-

ernmental immunity. (J.A. IV, 173-174; R. 777, 907, 1070).

When Judge Eaton ruled (A 29-31, 34-35, 39, 41-44) that as long as the resident supervisory personnel were on the management company's payroll (R. 86-89, 539, 543, 551-553, 555-556, 557-558, 561-563, 664, 667-668, 675, 680, 682, 699-702, 703, 705-706), that company would be a "joint employer" with the County, against whom federal rights might survive (J.A. V, 209-216, 219-220, 249-259, 245-246), the County amended the management contract and put Pawley's "management team" on the "County payroll" (R. 79, 81-83, 85-88, 89-91).[6a] The County Manager, McNayr, admitted that the transfer was made to defeat survival of federal collective bargaining rights and thereby "guarantee to the people of this area * * * transit [service] without the threat of strikes * * *" (R. 1074).

On February 9, 1962, by agreement with Pawley (J.A. II, 90-98), the County took "possession" of the Transit System and conditioned transit employment upon relinquishment of rights guaranteed and protected by federal law (R. 280-283).

C. The General Counsel's Tentative Declination To Issue a Complaint

On or about December 19, 1961, petitioners filed charges and thereafter amended charges with the National Labor Relations Board, alleging that by disclaiming power to bargain collectively, substituting civil service for collective bargaining as the method of regulating transit wages, hours and working conditions, and conditioning transit employment upon re-

[6a] That, however, is, of course, a separate payroll, funded exclusively from transit revenues.

linquishment of the federally-guaranteed right to bargain collectively and to strike, Dade County and Pawley were committing unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the National Labor Relations Act (R. 1178-1181). The former General Counsel processed these charges under a procedure administratively devised and reserved for substantial, novel and difficult questions of law.[7] He decided ultimately not to issue a complaint, pending conclusion of the state court proceeding. He reasoned that "the statutory exemption in Section 2(2) of the National Labor Relations Act is applicable" to the transit enterprise because "the County is the employer of the employees who are or will be engaged in the operation of the transferred transit lines; * * * and * * * the sale and purchase arrangements between Pawley and Dade County do not require a different conclusion." (A 7-8; R. 150-152, 162-167; J.A. III, 126, 127, 133-137).

Petitioners thereafter brought an action in the United States District Court for the District of Columbia to compel the General Counsel to issue a complaint. Dismissal of that action was affirmed on the ground that the General Counsel's tentative declination to issue a complaint is within the scope of his unreviewable discretion. *Division 1267, Amalgamated Ass'n. of St., Elec. Ry. and Motor Employees of America* v. *Ordman*, 116 U.S. App. D.C. 7, 320 F. 2d 729 (1963).

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[7] The Nature, Function and Administrative Operation of the Office of Appeals and The Administrati e Operation of the Advice Branch, in Hearings Before the House Subcommittee on the National Labor Relations Board, 87th Cong. 1st Sess. (1951). Part 2, pp. 1138, 1163.

REASONS FOR GRANTING THE WRIT

1. In *Motor Coach Employees* v. *Missouri*, 374 U.S. 74, 82 (1963), this Court held that a State cannot defeat the right to strike against a public utility "through the fiction of 'seizure' by the State." The question in this case is whether it can do so through the fiction of immediate, unconditional, "purchase and sale."

Missouri holds (374 U.S. at 81), that Section 2(2) removes from coverage only enterprises which are "actually * * * state owned and operated." The limitation is defeated if the exemption immunizes Government when it assumes control of the employment relation in the guise of "employer" without "full title and ownership." *United States* v. *United Mine Workers*, 330 U.S. 258, 284-85, 288, 329-30 (1947). For if, in the role of "employer," the Government is beyond reach, the Act does *not* regulate "labor relations" where Government's "involvement" falls "short" of creating "a state-owned and operated utility" 374 U.S. at 81. If Congress' regulatory policy is to prevail, Government as "employer" *must* be covered wherever Government ownership and operation is incomplete.

Sovereign immunity qua "employer" is not a license to outlaw collective bargaining in public utilities which are not actually the sovereign's. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960); *Terry* v. *Adams*, 345 U.S. 461, 466 (1953). Rights guaranteed by the National Act "can neither be nullified openly and directly by state legislators or

state executive or judicial officers, nor nullified indirectly by them through evasive schemes * * * whether attempted 'ingeniously or ingenuously.'" *Cooper* v. *Aaron,* 358 U.S. 1, 17, 18-19 (1958). Therefore, coverage cannot be defeated by the sophisticated scheme of making "civil service relationship" (*California* v. *Taylor,* 353 U.S. 553, 559-60 (1957)), an incident of nominal, deferred or contingent Government ownership and operation. Cf. *Tate* v. *Philadelphia Transportation Co.,* 410 Pa. 490, 190 A.2d 316, 317, 323 (1963).

In the *Mine Workers'* case this Court held that Government was entitled to exemption because, during seizure, it was actually the sole owner-operator of the mines. The presence of private managers was immaterial because they were only agents of the Government, removable at the Government's "discretion." By reserving removal power, Government "retained ultimate control." 330 U.S. at 288. Justices Black and Douglas considered it crucial (at 329), that "whatever control Government agents delegated to the private managers, those agents had full power to take away and exercise themselves." The Court was unanimous that if Government did not have that power, Government would not have been exempt from the Norris-LaGuardia Act. *Missouri* makes clear that it would not have been entitled to exemption under Section 2(2) either. 374 U.S. 74, 81, n. 8 and accompanying text.

The argument for treating the exemption as unqualified rests upon a misconception of the implied immunity doctrine to which the Labor Board was formerly committed. *Al J. Schneider Co.,* 87 NLRB 99, 100-01 (1949). The notion that "a political sub-

division must be expressly included in a statute if it is to be considered within the law's coverage" was explicitly rejected in *Plumbers* v. *County of Door,* 359 U.S. 354, 358-59 (1959): "This Court has many times held that government bodies not expressly included in a federal statute may, nevertheless, be subject to the law." Last term's decision in *Parden* v. *Terminal Railway,* 377 U.S. 184 (1964), re-emphasizes that express inclusion is not necessary to prevent immunity from defeating Congress' ascertainable objectives.

If States could defeat coverage by assuming "employer" status without "complete control" (*Mine Workers'* case, 330 U.S., at 329), Congress' condemnation of seizure (*Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 586, 657-60, 602-04 (1952)), would be illusory. Making "employer" status an incident of seizure must bring coverage, not exemption. "Grafting upon the words [of Section 2(2)] a purpose of Congress thus unequivocally expressed [by controlling legislative history] is the regular legislative mode for defining the scope of an Act of Congress." *Ibid.*, 343 U.S. at 603 (Frankfurter, J., concurring).

Seizure aside, the full ownership and actual operation limitation is necessarily implicit in Section 2(2). Congress exempted only "the sovereign." *United States* v. *United Mine Workers,* 330 U.S. 258, 272-73. It is "one of the first principles of our system of law" that when government participates in a joint venture with private entrepreneurs it is not "the sovereign properly so called." *Sloan Shipyards Corp.* v. *United States Shipping Bd.*, 258 U.S. 549, 565-67 (1922). In 1824, Chief Justice Marshall said:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading

> company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted." *Bank of the United States* v. *The Planters' Bank of Georgia,* 9 Wheat. (22 U.S.) 904, 907 (1824).

The principle was reiterated in *Pennsylvania* v. *The Wheeling Bridge Company,* 13 How. (54 U.S.) 518, 560 (1852):

> "When a state enters into a copartnership, or becomes a stockholder in a bank, or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders or partners."

If Government divests itself of sovereignty when it becomes a partner, *a fortiori* does it do so when it becomes a trustee or agent.[8] In such capacity, Government is "subject to congressional regulation * * * as fully as if it were a private person or corporation." *Parden* v. *Terminal Railway,* 377 U.S. 184, 196 (1964); *Hall* v. *Wisconsin,* 13 Otto (103 U.S.) 5, 11 (1880); *Davis* v. *Gray,* 16 Wall. (83 U.S.) 203, 232 (1873). Accordingly, the National Act has been held applicable to a state court receiver in the role of

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[8] *NLRB* v. *Russell Mfg. Co.,* 187 F. 2d 296, 297 (5th Cir. 1951); *Babcock and Wilcox Co.,* 108 NLRB 1622, 1623 (1954); *Southland Mfg. Co.,* 94 NLRB 813, 815 (1951). But cf., *Tampa Shipbuilding Co.,* 62 NLRB 954, 960-961 (1945), which the General Counsel considered authority against issuance of the complaint herein. Brief for appellee in *Division 1267, etc.* v. *Ordman,* 17,649, D.C. Cir., pp. 33-35.

"employer." *NLRB* v. *Bachelder*, 120 F. 2d 574, 576, 579 (7th Cir. 1941), affirming *Hoosier Veneer Company* (1940), 21 NLRB 907, 908-09, 924, 926, 928-29, 932-33, 934-35, 935-36, cert. denied, 314 U.S. 647 (1941). The County's contractual interest and participation makes the transit system at best a "joint venture"; as joint venturer, the County is Pawley's agent-trustee. *Hitchman Coal Co.* v. *Mitchell*, 245 U.S. 229, 249 (1917); *National Marine Eng'rs Beneficial Ass'n* v. *NLRB*, 274 F. 2d 167, 171 (2d Cir. 1960); *Tate* v. *Pennsylvania Transportation Co.*, 410 Pa. 490, 190 A.2d 316 (1963).

For the purpose of National Act coverage, whether a venture is actually government owned and operated is a question "of federal law." *Parden* v. *Terminal Railway, supra*, 377 U.S. at 185, 187, 188.[9] Under federal law, an enterprise in which there is any private beneficial interest or independent right of control is not "government." "Instrumentalities * * * in which there are private interests are not departments of the government. They are private [enterprises] in which the Government has an interest." *United States Shipping Bd. Corp.* v. *Western Union Tel. Co.*, 275 U.S. 415, 426 (1928).[10] For example, federal land banks "are instrumentalities of the federal government, engaged in the performance of an important government function." But the fact that private investors may hold

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[9] Cf. *NLRB* v. *Hearst Publications*, 322 U.S. 111, 123 (1944); *California* v. *Taylor*, 353 U.S. 553, 563 (1947); *Schwabacher* v. *United States*, 334 U.S. 182, 198 (1948).

[10] Accord, *Moore* v. *Board of Trustees of Wabash & Erie Canal*, 7 Ind. 462 (1856); *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F. 2d 199, 202 (S.D.N.Y. 1929); *Bank of Philippines* v. *Rogers*, 165 F. Supp. 100, 109-10 (D.C. 1958) aff'd 281 F. 2d 12 (D.C. Cir. 1959); *Coale* v. *Société Co-Op.*, 21 F. 2d 180, 181 (S.D. N.Y. 1921); *Commercial Pacific Cable Co.* v. *Philippine Nat'l Bank*, 263 Fed. 218, 224 (S.D.N.Y. 1920).

stock in such banks "distinguish[es] them from the government itself and its municipal subdivisions, and from corporations wholly government owned and created to effect an *exclusively* governmental purpose." *Federal Land Bank* v. *Priddy,* 295 U.S. 229, 231, 232, 233 (1935).

Employees of such enterprises are not " 'Government employees' without more." *United States* v. *United Mine Workers,* 330 U.S. at 320 (Frankfurter, J., concurring), cf. 336-39, 345-51. If "the obligation to bear the financial burden of [employees'] wages and the receipt of the benefits of the hours worked" is not *really* or *exclusively* Government's "the conditions of the relation are such that the process of collective bargaining may appropriately be used as contemplated by the Act." NLRB v. *E. C. Atkins & Co.,* 331 U.S. 398, 414 (1947). Cf. *NLRB* v. *Colten,* 105 F. 2d 179, 183 (6th Cir. 1939); *NLRB* v. *Hearst Publications, Inc.,* 322 U.S. 111, 129 (1944).

The language and legislative history of Section 2(2) itself indicates that Congress intended to limit immunity to enterprises which are in fact wholly government owned and operated. Only "wholly owned" government corporations are exempt. Those with private shareholders are plainly covered. It is inconceivable that Congress could have intended to distinguish between corporations and other forms of "ownership association" (Act, Section 1), such as partnerships, business trusts, and the like, exempting joint public-private ventures *except* when ownership interests are organized in the corporate form.

To disregard private beneficial interest and independent control in a government enterprise is, in effect,

to exempt "government instrumentalities" as such. This Congress has repeatedly refused to do.[11]

Missouri holds that States cannot circumvent coverage by making title, possession and legal proclamations equal actual Government ownership and operation.[12] Federal law determines where the equities are by "look[ing] * * * at the facts beneath forms" (*United States Grain Corp.* v. *Phillips*, 261 U.S. 106, 113 (1923)); "realities become decisive." *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 524 (1940); *Cherry Cotton Mills* v. *United States*, 327 U.S. 536, 539 (1946); *United States* v. *Rainwater*, 244 F. 2d 27, 31-32 (8th Cir. 1957), aff'd 356 U.S. 590.

Dade County has not invested any funds or credit in the transit system and it therefore does not beneficially own any of the assets.[13] County "control" and

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[11] S.2926, 73rd Cong., 2d Sess. (1934) Sec. 3(2) in 1 Leg. Hist. N.L.R.A. Govt. Print. Off. 1949, p. 2; H.R.3020, 80th Cong., 1st Sess., Sec. 2(2) in 1 Leg. Hist. L.M.R.A. Govt. Print. Off. 1948, p. 32. Senator Taft said in 1949 (93 Cong. Rec. 6527, 2 Leg. Hist. L.M.R.A. p. 1605): "The House bill contained a complete exemption of all Government instrumentalities of every kind, which include the national banks. We objected very strenuously to that. We included only wholly Government-owned corporations and Federal Reserve banks."

[12] In a recent brief to the Fourth Circuit, copies of which have been lodged with the Clerk, the Labor Board asserts that States cannot defeat coverage by "labeling a privately owned and privately operated enterprise * * * a 'political subdivision' ". Brief for the Board in *NLRB* v. *Randolph Electric Membership Corporation*, Nos. 9437 and 9438, filed June, 1964, p. 27. *A fortiori*, it would seem, should it be impossible to defeat coverage by labelling private ownership and operation public. Cf. Brief, pp. 18-27.

[13] That the County will accumulate the purchase price by siphoning profits to Pawley in the guise of repayment of capital and "interest" does not make Pawley a creditor or the County a debtor. *Coale* v. *Société Co-Op.*, 21 F. 2d 180, 182 (S.D.N.Y. 1921); *Cohen*, Morris Raphael, *Property and Sovereignty*, 13 Cornell L. Q. 8, 13 (1927); Ballantine on *Corporations* (1946), pp. 12-13.

operation is only nominal. "It would seem to be essential that the Government should have the ultimate right to make all decisions * * *." *Boston Elevated Ry. Co.* v. *Welch,* 25 F. Supp. 809, 811 (D. Mass. 1939).

Limitation of the exemption to enterprises in which Government has full beneficial interest evidenced by ultimate control is indispensable to prevent government immunity from inuring to the benefit of private entrepreneurs. *United States* v. *United Mine Workers,* 330 U.S. 258, 329 (Justices Black and Douglas, concurring). Federal policy does not allow "profits earned by [rejection of collective bargaining to] contribute to * * * the success [of a private investor]." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 724 (1961); *Hampton* v. *City of Jacksonville,* 304 F. 2d 320, 322-23 (5th Cir. 1962), cert. denied, 371 U.S. 911 (1962).

Of course, if Dade County in its capacity of transit "employer" is covered, Florida cannot constitutionally withhold from it power to bargain collectively or extend immunity to strikes. *California* v. *Taylor,* 353 U.S. 533, 567-68 (1957); *Hill* v. *Florida,* 325 U.S. 538, 542 (1945); *Eppinger & Russell Company,* 56 NLRB 1259, 1269 (1944).

Restriction of exemption to actually government owned and operated enterprises neither impairs nor interferes with any "essential state functions." *Plumbers* v. *County of Door,* 359 U.S. 354, 359 (1959). It does not "even remotely affect * * * the right of a State to own or operate a public utility or any other business." *Motor Coach Employees* v. *Missouri,* 374 U.S. 74, 83 (1963). All it does is prevent ostensible

state ownership and operation from defeating federal rights. That is essential if federal supremacy is to prevail. *Ibid.*, at 82; *Cooper* v. *Aaron*, 358 U.S. 1, 17-19 (1958).

2. Unless promptly rendered ineffectual by this Court, the technique of evading coverage by endowing a utility with governmental immunity indefinitely as the means of acquiring funds with which to purchase it will become a blueprint for wholesale nullification of Congress' refusal to exempt public utilities from the National Act. The Dade County experiment in evasion must not succeed.

3. Assuming that the stated argument for coverage is not frivolous, the Florida courts violated constitutional inhibitions by undertaking to evaluate and reject it. *Incres Steamship Co.* v. *International Maritime Workers U.*, 372 U.S. 24, 27 (1963); *Retail Clerks* v. *Schemerhorn*, 373 U.S. 746, 755-57 (1963); *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173, 182 (1962); *San Diego Unions* v. *Garmon*, 359 U.S. 236, 244-45 (1959).

The County's reliance upon *International Longshoremen's Ass'n, AFL-CIO* v. *Georgia Ports Authority*, 217 Ga. 712, 124 S.E. 2d 733, cert. denied, 370 U.S. 922 (1962), is entirely misplaced, for there were no private beneficial or control interests in that venture. Indeed, the Supreme Court of Georgia noted (124 S.E. 2d 733, 735) that the "Ports Authority holds title to the property it possesses *only* for the benefit of the State and the public." (Emphasis added.) Even the

Court of Appeal below conceded (A 13), that this "distinction is valid."

The Florida courts compounded the violation of adjudication by enjoining an arguably protected strike and collective bargaining. Florida is in violation of the Supremacy Clause.

4. Reliance upon the General Counsel's inaction to avoid the arguability bar is in square conflict with this Court's statement in *San Diego Unions* v. *Garmon*, 359 U.S. 236, 245-246 (1959) that "refusal of the General Counsel to file a charge * * * does not give the States power to act." In glaring contrast, the Supreme Court of Wisconsin recently recognized (*Hanna Mining Co.* v. *District 2, MEBA*, 127 N.W. 2d 393 (Wis. 1964), that *Garmon* prohibits state courts from treating "rulings of the general counsel [as] determinations of the NLRB," and according them emancipatory significance. The General Counsel's, of course, is not, a quasi-judicial office (*Ohio Valley Builders Exchange* v. *Carpenters* (Ct. Com. Pleas, Ohio, 1962) 50 LRRM 2573), and his declination can never do more than eliminate the possibility of decision by the Board. "Such elimination of the Board does not * * * eliminate the applicability of the National Labor Relations Act, as amended * * *." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 74 (1956).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition should be granted and the decision below reversed.

Respectfully submitted,

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Counsel for Petitioners

August 14, 1964.

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1964 Monday, May 18, 1964

Case No. 33,111

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, *et al., Appellants,*

v.

DADE COUNTY, a political subdivision of the State of Florida, *et al., Appellees.*

This cause coming on for hearing and consideration of the Court, it now appears to the Court that no jurisdiction is vested in this Court to consider and determine the cause; it is therefore ordered that the appeal which was entered in this cause in the District Court of Appeal, Third District of Florida, on December 9, 1963, be and the same is hereby dismissed.

(SEAL)

A True Copy

TEST:

GUYTE P. MCCORD
Clerk Supreme Court.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

July Term, A.D. 1963

Case No. 62-137

DADE COUNTY, a political subdivision of the State of Florida, *et al.*, *Appellants*,

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, *et al.*, *Appellees*.

Case No. 62-639

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, *et al.*, *Appellants*,

v.

DADE COUNTY, a political subdivision of the State of Florida, *et al.*, *Appellees*.

Opinion filed November 1, 1963.

Appeals from Circuit Court for Dade County, Joe Eaton, Judge.

Darrey A. Davis, County Attorney, for Dade County.

Cowart, Dollar & Glassford, Mozart G. Ratner (Washington, D. C.), for Amalgamated Association.

Before HORTON, PEARSON and HENDRY, JJ.

PER CURIAM.

We here review two appeals from the same final decree.[1]

[1] It should be noted that appeal 62-639 was originally filed in the Supreme Court. Appeal 62-137 was filed here and was held in abeyance pending ruling in the Supreme Court on the jurisdiction of that Court. Subsequently appeal 62-639 was transferred to this Court and then the two appeals were consolidated by order of this Court.

The cause was initiated in the Circuit Court by a complaint for declaratory decree in which Dade County and the Metropolitan Dade County Transit Authority (a governmental entity of Dade County) sought judicial determination of the status of the County as related to the Amalgamated Association of Street, Electric Railway and Motor Coach Employees in the operation of the Transit Authority.

The final decree declared the rights of the parties as follows:

> "1. From the testimony presented and the documentary evidence presented, this Court finds that in the event the plaintiffs take over the public utility (pursuant to contract in evidence in this cause) now owned and operated by private person, firm or corporation, said person, firm or corporation will maintain, based upon circumstances presently reflected by this record, a substantial financial or operating control. Therefore, the defendant union and its members are excluded from the operation of F.S. 839.221 (and the plaintiffs are not barred from employing the membership of the defendant union).
>
> "2. Plaintiffs are not required by law to offer employment to the members of the defendant union, and the members of the defendant union would not by operation of law (Sub-Section (4) of F.S. 839.221) be included in classified Civil Service and other benefit provisions and systems of Metropolitan Dade County, Florida, upon consummation of the contractual transaction evidenced by the record in this cause.
>
> "3. Plaintiffs are not authorized by law to enter into a collective bargaining agreement with defendants and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause.

"4. Plaintiffs are not authorized to recognize as lawful any strike directed against them and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause."

Dade County and the Transit Authority appeal from certain portions of the resultant decree, while the bus operators' union appeals from others. The facts giving rise to the issues here involved are complex and lengthy, but must of necessity be set forth.

In order to accomplish the objective of establishing and developing a unified mass transit system under County ownership, the Board of County Commissioners enacted Ordinance No. 60-23 creating the Metropolitan Dade County Transit Authority as an agency of the County government, with exclusive jurisdiction in respect to the operation and maintenance of all transit systems acquired by the County subject to policies established by the County Commission. On May 17, 1961, the County agreed to purchase the bus transportation system owned by W. D. Pawley through the purchasing of all of the capital stock of four transit companies for an agreed purchase price of $7,705,274. This purchase price was to be paid through the use of revenue bonds of the County, issued in part to Mr. Pawley, pursuant to a Trust Agreement, and payable only from net revenues derived by the County from the operation of its newly acquired transit system. Subsequent to the above agreement, a so-called Supplemental Agreement providing for deferment of payment of a part of the purchase price and an Agreement for Delivery of Possession of Transit System were entered into. By the latter agreement the County was granted the right, at its option, to take possession and become the owner of the transit system prior to the delivery of the revenue bonds.

In furtherance of its aim of securing a county-wide bus transit system, the Board of County Commissioners by

Ordinance No. 61-44 authorized the issuance of Dade County Transit System Revenue Bonds in the principal amount of $9,000,000, with interest not to exceed 5 percent a year, to provide funds for payment of the purchase price, construction of a central garage and office building, and to provide initial working capital for the County's operation of the transit system. In addition, the Ordinance authorized the execution of the Trust Agreement noted above, securing the payment of the revenue bonds.[2]

In view of these actions, the bus operators' union requested the County to (1) recognize said union as the exclusive bargaining agent for all county employees utilized in operating the transit system, (2) enter into a colective bargaining agreement covering these employees, and (3) to assume the existing collective bargaining agreement.

By resolution of November 21, 1961, the County Commission directed the County Attorney to institute appropriate litigation in order to secure judicial determination of the questions of law and matters of controversy raised by the Union concerning County recognition of the Union as bargaining agent for all transit employees and the proposed collective bargaining agreement. Pursuant to this resolution, complaint for declaratory decree was filed. The County sets forth therein that the established policy of the State of Florida prohibits any governmental entity from entering into a collective bargaining agreement with a labor union or negotiating with a labor union regarding wages, hours, and conditions of employment. Also placed

[2] The validity of the various contract documents and revenue bonds was upheld by the Circuit Court and affirmed by the Supreme Court of Florida in State v. Dade County, Fla. 1962, 142 So. 2d 79.

in controversy was the right of these employees to strike and the effect thereon of § 839.221, Fla. Stat., F.S.A.[3]

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[3] § 839.221, Fla. Stat., F.S.A.

Governmental officers and employees; prohibited participation in strikes or membership in organizations that assert right to strike against government employer

(1) No person shall accept or hold any office, commission or employment in the service of the state, of any county or of any municipality, who:

(a) Participates in any strike or asserts the right to strike against the state, county or any municipality; or

(b) Is a member of an organization of government employees that asserts the right to strike against the state, county or any municipality, knowing that such organization asserts such right.

(2) All employees who comply with the provisions of this section are assured the right and freedom of association, self-organization, and the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a vocational or a labor organization.

(3) In the event that any public utility owned and operated by a private person, firm or corporation is taken over on or after May 1, 1959, by the state, a county or a municipality but in fact said person, firm or corporation maintains a substantial financial or operating control, said persons then employed or to be employed shall be excluded from the operation of this section.

(4) Upon the acquisition of any public utility system from a private person, firm or corporation by any state, county or municipal government, then and in that event the employees of such private person, firm or corporation other than executive or management staff, shall be eligible to be included in classified civil service and other benefit provisions and systems of that governmental unit."

By its answer, the Union contended that (1) the operation of the transit companies affects interstate commerce within the meaning of the National Labor Relations Act, and thus, the labor relations involved are subject to such Act; (2) its members are not eligible for the County Civil Service program; (3) under the provisions of § 839.221, Fla. Stat., F.S.A., the government acquiring the utility *is* empowered to bargain collectively *where the former owner maintains a substantial financial or operating control;* (4) the County is without standing to raise the question concerning the right to make a collective bargaining agreement; and (5) under § 839.221, Fla. Stat., F.S.A., the County cannot lawfully acquire or operate the transit system without a collective bargaining agreement.

On December 19, 1961, the Union filed with the National Labor Relations Board a charge of unfair labor practices. However, no complaint was issued by the Board which had the following to say in this regard:

> "We have concluded that in the present posture of the case the County is the employer of the employees who are or will be engaged in the operation of the transferred transit lines; that the statutory exemption in Section 2(2) of the National Labor Relations Act is applicable; and that the sale and purchase arrangements between Pawley and Dade County do not require a different conclusion.
>
> "However, as you know, there is presently pending litigation in the Florida State Court between the parties which also raises questions as to the status of the transit lines employees and their right to engage in collective bargaining and to strike over terms and conditions of employment, under State law. The outcome of this litigation may conceivably have an impact on the unfair labor practices charge filed by the Amalgamated.

> "For that reason, and in order to permit a reexamination of the charge in the light of the final outcome of the State Court litigation and to avoid prejudicing the rights of the charging parties under the National Labor Relations Act's 6-month statute of limitations, the charge will not be dismissed at this time."

This determination was appealed by the Union to the District Court of the District of Columbia where the complaint was dismissed on the grounds of lack of jurisdiction over the subject matter. This decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit on June 13, 1963. Division 1267, Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees of America v. Ordman, 320 F. 2d 729 (D.C. Cir. 1963).

The Union has presented two points in its appeal: (1) The trial court erred in asserting jurisdiction, and (2) The trial court erred in holding that Florida law bars the County as transit employer from barganing collectively and immunizes it against strikes.

The County maintains that the circuit court correctly held that it had jurisdiction of the controversy, and in addition presents two points in its appeal: (1) The trial court erred in holding that Mr. Pawley maintains a substantial financial or operating control in the County transit system, and (2) The trial court erred in holding that the members of the bus operators' union who accepted employment as county employees would not be included in classified civil service and other benefits.

The Union's first point raises the question of federal pre-emption. The Union has maintained both in the state and federal courts that all jurisdiction on the question of the relationship of the Union to the County is in the federal system. Their position is buttressed by the pronouncement of the Supreme Court of Florida in Scherer & Sons, Inc. v. International Ladies' Garment Workers'

Union, Fla. 1962, 142 So. 2d 290. The court there reaffirmed the principle that where a situation is "arguably subject" to the prohibitions or protections of the Labor Management Relations Act, 1947 (Taft-Hartley Act, Title 29 U.S.C.A. § 141 et seq.), the National Labor Relations Board is the appropriate forum to initially determine the presence or absence of federal jurisdiction.

The chancellor held that the situation in the instant case was not "arguably subject" to the provisions of the Taft-Hartley Act. He clearly felt that the case came within the exemption provided in § 152(2) of this Act.[4]

As has been related, the Union filed a complaint in the controversy at hand with the National Labor Relations Board. The Board in its findings specifically found applicable the statutory exemption under § 2(2) of the National Labor Relations Act (quoted below as § 152(2) of U.S.C.A.). The Union has not met the burden of demonstrating error in the determination of the chancellor which was to the same effect. Thus, the question has been reduced to a supposed violation of *state law,* and a state court is free to determine questions involved. Upon these facts we think that the court had jurisdiction to proceed with the cause.

We turn now to the Union's second point—that the trial court erred in holding that Florida law bars the county

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[4] § 152(2) provides:

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

as transit employer from bargaining collectively and immunizes it against strikes. In the final decree the chancellor made findings on this issue. They are set out under numbers 3 and 4 at the beginning of this opinion, and are repeated here for clarity:

> "3. Plaintiffs are not authorized by law to enter into a collective bargaining agreement with defendants and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause.
>
> "4. Plaintiffs are not authorized to recognize as lawful any strike directed against them and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause."

The chancellor also filed an extensive opinion in support of his final decree. We take the liberty of quoting extensively from that portion referring to the above-quoted findings:

> "Therefore, having carefully considered all of the evidence in the case and the applicable law, the legislative history of Florida Statute 839.221, the intent of the Legislature, as manifest by the language of this statute, those facts generally known to the public at the time of the enactment of the statute, constitutional, statutory, and case law prevailing at the time of the enactment of the statute, and the arguments of able counsel of the parties in this case, the Court has firmly concluded the following:
>
> "1. In the event the plaintiffs take over the bus companies upon the circumstances revealed by the evidence in this case, Florida Statute 839.221 would be inapplicable to any persons employed by the bus companies at the time of takeover. In other words, as the Court weighs the eivdence, Mr. Pawley 'maintains a

substantial financial or operating control' within the meaning of Sub-Section (3) of that statute. Further, such persons who may be employed for so long a period as Mr. Pawley continues to maintain that substantial control would likewise be excluded from the operation of 839.221.

"2. Unless clearly authorized to do so by the enactment of legislation, the plaintiffs would not be authorized and are not now authorized to enter into collective bargaining agreements, within the labor relations meaning of the term, with the defendants.

"3. Unless clearly authorized to do so by the enactment of legislation, the plaintiffs could not recognize as lawful any strike against the plaintiffs by the defendants. In other words, the statute would be inapplicable to the employees, but there could be neither collective bargaining nor strike.

"The Court will now discuss its conclusions, listed as 1, 2, and 3 above, and in that discussion will construe 839.221.

"Whether or not it is ever actively exercised, the majority bondholder maintains, through his trustee, substantial control—control at least equal to that of any elected or appointed official who may be involved in the operation of the buses. This substantial control—and I add, parenthetically, actually over the management company as well—is control maintained through the relationship of its trustee to certain individuals or organizations which themselves exercise substantial operating control. The control comes about through the method prescribed for appointment and removal of key figures in the operation.

"As to conclusions 2 and 3, you gentlemen are all familiar with the Miami Waterworks case. (26 So. 2d 194) The basic Florida Statute is recited in it. From

a reading of that case and a close study of that statute that we are now construing (F.S. 839.221 does not employ the phrase 'collective bargaining'), I am led to the conclusion that in Florida there can be no collective bargaining within the labor relations meaning of the term, and that there is no present authority for the plaintiffs to contract with the defendants.

"Florida law and, indeed, the undisputed law in every jurisdiction in this country, is that in the absence of clear, concise, direct legislative authority, unions and their members are denied the right to strike against the government, whether it be federal, state, county, or municipal. The profit system is missing in public employment, public employees owe undivided allegiance to the public employer, and the continued operation of public employment is indispensable to the public interest.

"The courts have said that as a general rule collective bargaining has no place in government service. The employer is the whole people. This is a government of law, not men. For the courts to hold otherwise than as I have just explained would be to sanction control of governmental functions not by laws but by men. Such policy, if followed to its logical conclusion, would inevitably lead to chaos.

"The defendants have urged throughout this case that in the event the control that is specified in Subsection (3) of the statute is maintained, that 839.221 actually is legislative authority to bargain collectively and to strike. Such is not the case. Authority to strike is not given by implication. Neither is the judiciary delegated the legislative authority to legislate the right to strike upon certain findings of fact before the judiciary. Neither is a private individual or a government corporation or a government entity, such as the Authority here, in position to grant or to

deny that right through the avenue of some contractual provision. This is the fatal void in the defendants' case in regard to collective bargaining and the right to strike.

"Florida Statute 839.221, not being applicable to the defendants, they are in the exact position as they were in before the statute was passed; that is, no right to bargain collectively, no right to strike, because the statute simply has no applicability to them. They are excluded from the provisions of it under such circumstances as we have in this case.

"Therefore, there is nothing for them to fall back upon. But most important, the format of this statute that we are construing is to set up certain disqualifications for employment within the state, county, or municipality. The statute is basically a prohibition against employing certain persons or certain classes of persons.

"To construe its inapplicability to the defendants as breathing some legislative authority in them to strike is to say that such could be done by indirection or inference, and such is not the law."

The Union urges that the Miami Water Works case (Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194, 165 A.L.R. 967), cited by the chancellor, is not applicable to the instant situation because the case dealt with government as employer in a venture in which there were no private investment or private control. The distinction is valid, but we do not think that its destroys the rationale of the chancellor's opinion. The chancellor correctly found that the Transit Authority was an instrumentality of the metropolitan government. The nature of the "substantial financial or operating control" found by the final decree to repose in Mr. Pawley is

not such as to destroy the governmental character of the Transit Authority.

In support of a contrary conclusion, we are cited United States v. United Mine Workers, 330 U.S. 258, 67 Sup. Ct. 677, 91 L.Ed. 884 (1947). It is urged that the United Mine Workers' case stands for the proposition that to qualify for an exemption from the Norris-LaGuardia Act, the government must not only hold what amounts to full title and ownership of the enterprise in which it occupies the role of "employer", but in addition, must have "ultimate control." It is then urged that Florida should follow this construction in applying its own statute. We do not consider the Union's statement to be the holding of the cited case. It is clear from the facts stated that although utilizing the services of private managers, the Federal Government nevertheless had retained ultimate control. The holding, as we understand it, was that where the Government had seized actual possession of the mines and was operating them, the relationship between the Government and the workers was that of employer and employee. Thus, viewed, there is no conflict between the holding of the trial judge in the present case and that of the Supreme Court of the United States in the case cited. Nevertheless, we think it well to go a step further and point out that while there is no doubt that the record before us shows a substantial control in Mr. Pawley, still there is no evidence that he has the ultimate control over the transportation facilities involved.

Having determined that the circuit court had jurisdiction to enter the decree, and that the Union has not demonstrated error upon the court's application of the Florida law which prohibits collective bargaining by the strikes against the governmental entity, we must affirm the decree upon the appeal of Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America (No. 62-639).

The first point on the County's appeal challenges the court's finding that Mr. Pawley maintains a substantial financial or operating control in the transit system. The record contains abundant support for the chancellor's finding on this point.

The entire question of Mr. Pawley's financial and managerial control (or lack thereof) hinges upon his power to appoint and remove the trustees of the Dade County Transit System. This follows because (1) effectual managerial and financial control are in the hands of a management firm and a firm of consulting engineers, the approval of whose appointment by Mr. Pawley was both necessary and obtained; (2) prior to changing these two firms for others, approval of the trustees is required; and (3) Pawley can both remove and appoint the trustees at will. Therefore, through his power to control the trustees, Pawley has a substantial control of the transit system through the management firm and the consulting engineers.

The County's second point remains for consideration. Such point urges the trial court erred in holding that the members of the bus operators' union who accepted employment as county employees would not be included in classified civil service and other benefits. The chancellor's findings upon this issue are found in paragraph "2" of the portion of the decree quoted at the beginning of this opinion. They are as follows:

> "2. Plaintiffs are not required by law to offer employment to the members of the defendant union, and the members of the defendant union would not by operation of law (Sub-Section (4) of F.S. 839.221) be included in classified Civil Service and other benefit provisions and systems of Metropolitan Dade County, Florida, upon consummation of the contractual transaction evidenced by the record in this cause."

By virtue of his finding that the defendant union and its members are excluded from the operation of § 839.221, Fla. Stat., F.S.A., the chancellor excluded the members of the union from the benefit of subsection (4) thereof. (See footnote [2] for the section in full). Subsection (4) is as follows:

> "(4) Upon the acquisition of any public utility system from a private person, firm or corporation by any state, county or municipal government, then and in that event the employees of such private person, firm or corporation other than executive or management staff, shall be eligible to be included in classified civil service and other benefit provisions and systems of the that governmental unit."

The chancellor's conclusion is supported by the provision of Subsection "(3)" of § 839.221 which specifically says that where there is substantial private control the whole section shall be inapplicable.

But does the inapplicability of subsection "(4)" mean that these County employees cannot have the benefit of the County employees' classified civil serivec and other benefits of County employment? We do not so read subsection "(4)". The subsection directs that the employees of certain public utility systems shall be eligible for classified civil service. It does not by its terms prohibit the present union members from becoming eligible if they are by other provisions of law eligible. The Larger Counties Civil Service Law, Chapter 30255, Acts of 1955, Laws of Florida, as amended, (Article IV, Division 2 of the Code of Metropolitan Dade County), creates a civil service system in each county having a population of more than 450,000, and provides that:

> "The classified service to which this law shall apply shall comprise *all positions in the county service* existing on January 1, 1956 or thereafter established except

the following: "(Thereafter follows an enumeration of the 23 county positions and employees excluded from the classified service)" [Emphasis supplied].

Thus, all County employees in Dade County are required to be in the classified service (civil service) except those specifically excluded therefrom. No exclusion or exemption is made for personnel in positions which would be engaged in work necessarily incident to the operation of the County-owned transit system.

Moreover, the Metropolitan Dade County Transit Authority Ordinance (Ordinance No. 60-23), a local legislative enactment which the Supreme Court of Florida (in *State* v. *Dade County*, Fla. 1962, 142 So. 2d 79) held the County Commission was lawfully empowered to enact, expressly provides:

> "Section 2-164. Rights of Employees of Transit Systems Acquired by County.
>
> "Whenever the county acquires existing transit systems or facilities from a publicly or privately owned public utility, to the extent necessary or feasible for the economic operation of such facilities, all of the employees of such acquired transit system whose duties pertain to the facilities acquired shall be employed in comparable positions in the county service and the pay status, seniority, vacation and sick leave rights shall be preserved and maintained to the fullest possible extent. All employees of the authority shall be deemed, considered or construed as county employees and shall be entitled to all the rights, privileges and benefits of county employees."

Furthermore, Section 4.05 of the Home Rule Charter of Government for Dade County, Florida, provides, in part, as follows:

> "A. The Board of County Commissioners shall establish and maintain personnel and civil service,

retirement, and group insurance programs. The personnel system of the county shall be based on merit principles in order to foster effective career service in county employment and to employ those persons best qualified for county services which they are to perform.

• • •

"C. Except as provided herein, Chapter 30255, General Laws, 1955, as it exists on the effective date of this Charter, shall remain in effect until amended or changed by ordinance of the Board of County Commissioners adopted by two-thirds vote of the members present after recommendation from either the Personnel Advisory Board or the County Manager."

In addition, Chapter 122, Florida Statutes, provides for a compulsory retirement system for all state and county employees, and requires the county to deduct six percent from each salary check of every county employee for payment into the State and County Officers and Employees Retirement Fund. The provisions of this general law are applicable to all employees of Dade County, including those employed by the County in connection with the operation of the county-owned transit system.

Consequently, all persons who become employees of Dade County, whether they are members of the Bus Operators Union or not, immediately become compulsory participants in the state and county retirement program.

We therefore hold that paragraph numbered "(2)" of the final decree is erroneous, and upon remand the chancellor is directed to enter an order amending the final decree by striking therefrom said paragraph and entering an amended provision in accordance with this opinion. The chancellor may in his discretion take additional testimony and evidence as he finds necessary to enter an appropriate declaration of the rights of the parties upon the issue of

the rights of the union members to classified civil service and other benefits.

Affirmed in part and reversed in part and remanded.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. IN CHANCERY.

No. 61C 12832—Eaton

DADE COUNTY, a political subdivision of the State of Florida, et al., *Plaintiffs,*

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, a labor union organization, et al., *Defendants.*

Final Decree

THIS CAUSE came on to be heard upon plaintiffs' complaint for declaratory decree and for injunctive relief and the answer filed thereto. The prayer for injunctive relief has been withdrawn by plaintiffs. The Court has considered the evidence in the cause and has heard and considered the testimony and argument of counsel.

Therefore, this Court ORDERS, ADJUDGES and DECREES by way of declaratory decree that:

1. From the testimony presented and the documentary evidence presented, this Court finds that in the event the plaintiffs take over the public utility (pursuant to contract in evidence in this cause) now owned and operated by private person, firm or corporation, said person, firm or corporation will maintain, based upon circumstances presently reflected by this record, a substantial financial or operating control. Therefore, the defendant union and its members are excluded from the operation of F.S.

839.221 (and the plaintiffs are not barred from employing the membership of the defendant union).

2. Plaintiffs are not required by law to offer employment to the members of the defendant union, and the members of the defendant union would not by operation of law (Sub-Section (4) of F.S. 839.221) be included in classified Civil Service and other benefit provisions and systems of Metropolitan Dade County, Florida, upon consummation of the contractual transaction evidenced by the record in this cause.

3. Plaintiffs are not authorized by law to enter into a collective bargaining agreement with defendants and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause.

4. Plaintiffs are not authorized to recognize as lawful any strike directed against them and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause.

5. Those proceedings had before the Court on January 2, 1962, and the oral conclusions reached and announced in open court on that date shall be and hereby are made a part of this final decree. Those remarks classified as observations and dicta are specifically excluded from the final decree.

6. Costs of these proceedings to be assessed and taxed upon appropriate motion.

DONE AND ORDERED in Miami, Dade County, Florida, this 4th day of January 1962.

JOE EATON
Circuit Judge

Copies of the above order were mailed to attorneys of record on the date of entry thereof.

W. DELOACH

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
IN CHANCERY

No. 61C 12832—Eaton

DADE COUNTY, a political subdivision of the State of Florida, *et al, Plaintiffs,*

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, a labor union organization, *et al, Defendants.*

Opinion

Dade County contracted with the owner of a public utility to purchase the public utility, a bus system. The County contracted with a private "management company" to manage the system. The bus drivers employed by the utility company at the time of the execution of the contract to purchase were and are members of a labor union that asserts the right to strike against the government. Dade County brought a complaint for declaratory decree and, pursuant to the contract to purchase, gave notice to the seller of "take over" of the bus system. The County seeks to have the Court determine its rights, status, etc., under 839.221 Florida Statutes.

The following is the opinion of the Court:

One of the prayers in the plaintiffs' complaint reads as follows:

> "4. That the Court will construe and apply the provisions of Section 839.221, Florida Statutes, in the light of the several agreements described herein and declare, determine, and adjudicate the rights, status, powers, duties, and responsibilities of the respective parties thereunder."

You can readily see that a declaratory decree rendered on that prayer cannot be concisely given. One cannot declare the rights that are fertile here for declaration without spending considerable time in doing so.

Those persons, gentlemen, who are superficially acquainted with the subject matter of this case are in position to treat it summarily. Prejudice for one side or the other is a great time saver. It allows one to reach a decision without the trouble of having to become completely acquainted with the facts and the law in the case; but the impartial finds it almost unavoidable that the matter be belabored to a degree, because it is that complex, gentlemen.

Plaintiffs in this case sought injunctive relief and declaratory decree. The prayer for injunctive relief has been withdrawn by the plaintiffs.

At the outset, it should be made clear that declaratory relief is available only when there is a present need for declaration and that declaration may deal only with a present ascertainable state of fact. Such decree can be had only when there are those before the Court who have an antagonistic interest in the subject matter, whether in law or in fact or both. In other words, there must be a bona fide dispute as to a present justiciable question in order to invoke declaratory relief.

The plaintiffs here are in genuine doubt as to their rights, status, immunity, power, or privilege in the subject matter, and they are entitled to have those doubts removed; but a seriously debatable jurisdictional question has been raised in this case. This Court's decree, therefore, will be limited to a construction of that state statute which has been under such close scrutiny here (the Court clearly has jurisdiction to do that) and to a resolution of such doubts presently entertained by the plaintiffs as may be resolved without invading the jurisdiction of the NLRB or the federal courts.

I shall not relate the facts of this case. They are well known to the parties. Suffice it to say, the parties here declared an armistice at a time subsequent to the filing of the complaint in the cause. There can be no armistice without controversy.

Further, the state of armistice is to prevail only until such time as this Court renders its decree, which act is imminent. Whether or not the plaintiffs' notice of takeover of the bus system was revoked by the plaintiffs' armistice agreement or whether it will be automatically revitalized by the entry of the court decree is not for me to decide. Such question is not before me. Neither is the party who has contracted to sell the bus system. But the recent giving of that notice by the plaintiffs makes this matter ripe for judicial declaratory decree. Such a decree will be rendered within the jurisdictional limitation already detailed.

What precisely are the doubts presently entertained by the plaintiffs?

Under the facts present, the plaintiffs are in genuine quandary as to whether or not 839.221 of the Florida Statutes is applicable to such employees now working for the bus companies which it plans to take over who are members of the defendant union, which union asserts the right to strike against the County. The plaintiffs are not certain whether or not they may lawfully employ such union members. They are not certain whether or not they must offer such union members employment upon takeover. Indeed, they are in doubt as to whether or not such bus company employees will become entitled by operation of law to such benefits as may be said to flow to those in the County employment who are under Civil Service provisions. There is dispute as to whether or not the plaintiffs may be compelled to bargain collectively with the Union upon takeover. The plaintiffs are in doubt as to whether or not a strike by the Union membership may be lawfully directed against them following takeover.

In short, upon their venture into the bus business, they need an interpretation of 839.221. They need to know what effect that statute may have upon this venture that they are apparently about to undertake. The effect of that statute may be decreed upon consideration of the evidence now—and I emphasize "now"—before the Court, and the law applicable thereto.

These doubts will be resolved by this decree. Theoretical doubts will not be resolved. Most important, doubts concerning the relationship now or in the future between the defendants and individuals or management corporations not before this Court cannot here be reconciled, nor put to rest. This Court has no jurisdiction over the persons or the subject matter in that regard.

Therefore, having carefully considered all of the evidence in the case and the applicable law, the legislative history of Florida Statute 839.221, the intent of the Legislature, as manifest by the language of this statute, those facts generally known to the public at the time of the enactment of the statute, constitutional, statutory, and case law prevailing at the time of the enactment of the statute, and the arguments of able counsel of the parties in this case, the Court has firmly concluded the following:

1. In the event the plaintiffs take over the bus companies upon the circumstances revealed by the evidence in this case, Florida Statute 839.221 would be inapplicable to any persons employed by the bus companies at the time of takeover. In other words, as the Court weighs the evidence, Mr. Pawley "maintains a substantial financial or operating control" within the meaning of Sub-Section (3) of that statute. Further, such persons who may be employed for so long a period as Mr. Pawley continues to maintain that substantial control would likewise be excluded from the operation of 839.221.

2. Unless clearly authorized to do so by the enactment of legislation, the plaintiffs would not be authorized and

are not now authorized to enter into collective bargaining agreements, within the labor relations meaning of the term, with the defendants.

3. Unless clearly authorized to do so by the enactment of legislation, the plaintiffs could not recognize as lawful any strike against the plaintiffs by the defendants. In other words, the statute would be inapplicable to the employees, but there could be neither collective bargaining nor strike.

The Court will now discuss its conclusions, listed as 1, 2, and 3 above, and in that discussion will construe 839.221.

Whether or not it is ever actively exercised, the majority bondholder maintains, through his trustee, substantial control—control at least equal to that of any elected or appointed official who may be involved in the operation of the buses. This substantial control—and I add, parenthetically, actually over the management company as well—is control maintained through the relationship of its trustee to certain individuals or organizations which themselves exercise substantial operating control. The control comes about through the method prescribed for appointment and removal of key figures in the operation.

As to conclusions 2 and 3, you gentlemen are all familiar with the Miami Waterworks case. (26 So. 2d 194) The basic Florida Statute is recited in it. From a reading of that case and a close study of that statute that we are now construing (F.S. 839.221 does not employ the phrase "collective bargaining"), I am led to the conclusion that in Florida there can be no collective bargaining within the labor relations meaning of the term, and that there is no present authority for the plaintiffs to contract with the defendants.

Florida law and, indeed, the undisputed law in every jurisdiction in this country, is that in the absence of clear, concise, direct legislative authority, unions and their mem-

bers are denied the right to strike against the government, whether it be federal, state, county, or municipal. The profit system is missing in public employment, public employees owe undivided allegiance to the public employer, and the continued operation of public employment is indispensable to the public interest.

The courts have said that as a general rule collective bargaining has no place in government service. The employer is the whole people. This is a government of law, not men. For the courts to hold otherwise than as I have just explained would be to sanction control of governmental functions not by laws but by men. Such policy, if followed to its logical conclusion, would inevitably lead to chaos.

The defendants have urged throughout this case that in the event the control that is specified in Sub-Section (3) of the statute is maintained, that 839.221 actually is legislative authority to bargain collectively and to strike. Such is not the case. Authority to strike is not given by implication. Neither is the judiciary delegated the legislative authority to legislate the right to strike upon certain findings of fact before the judiciary. Neither is a private individual or a government corporation or a government entity, such as the Authority here, in position to grant or to deny that right through the avenue of some contractual provision. This is the fatal void in the defendants' case in regard to collective bargaining and the right to strike.

Florida Statute 839.221, not being applicable to the defendants, they are in the exact position as they were in before the statute was passed; that is, no right to bargain collectively, no right to strike, because the statute simply has no applicability to them. They are excluded from the provisions of it under such circumstances as we have in this case.

Therefore, there is nothing for them to fall back upon. But most important, the format of this statute that we are

construing is to set up certain disqualifications for employment within the state, county, or municipality. The statute is basically a prohibition against employing certain persons or certain classes of persons.

To construe its inapplicability to the defendants as breathing some legislative authority in them to strike is to say that such could be done by indirection or inference, and such is not the law.

At this point I think it important that the act that we are actually construing is found in the general laws of 1959, the original act. It is very important to note that in the Florida Statutes Annotated the word "section" is used in Sub-Section (3). In the act the language is, "shall be excluded from the operation of this *act*."

To further construe the statute, pursuant to the plaintiffs' prayer for declaratory decree, Sub-Section (4) is not applicable to the defendants because the statute is not applicable to them. For clarification, however, it is obvious to the Court that (4) was enacted for the purpose of providing for the inclusion of former bus company employees in the retirement programs in the event the County should acquire a public utility system, as distinguished from taking one over with substantial control remaining. Precise legislative authority is needed to accomplish that purpose.

The people that administer these retirement programs have actuarial programs to consider. Before a group of employees is eligible, there must be some legislation on the subject. This is that authority, (4), if a county acquires a bus system, as distinguished from taking one over.

There seems to be no conflict as to the meanings of Section 1 and Section 2 of the statute.

It appears to this Court that the act here being construed, rather than being a document of confusion, as some would make it, is a demonstration of rather unusual

foresight on the part of the Legislature as a whole. The act, though not so clear and unambiguous as to remove its interpretation from the area of declaratory decree, is not difficult to construe, and this Court is confident that the following general construction of the statute is in clear accord with the legislative intent.

First, we must note the distinction between the words "upon the acquisition of" and "is taken over by a county but, in fact, said person maintains a substantial financial or operating control."

You gentlemen may remember that I asked you if you thought there was any distinction there. To acquire in the law is to get as one's own. To acquire something is to possess and control a property acquired. "Acquired" means something vested, not mere possession.

The language used in (3) described a situation where possession has been had by the purchaser, but complete control has not been had. In other words, (3) anticipates that in a substantial control situation, which you have here, there must be federal recourse available to the bus company employees against the substantial control entity. The Legislature of Florida recognized that it cannot legislate away the impact of the statutes passed by the Congress and it recognized that the courts of law have no jurisdiction to do so.

The Legislature knew that there would be no method of preventing access to the federal agencies and no control over the federal courts, hence the language of Sub-Section (3).

Interestingly enough, the very language of Sub-Section (3) is in striking similarity to federal cases and reports of federal agencies which deal with situations where government-operated activities are conducted with substantial control remaining in private employers. The long recognized test on the question of who is the employer is known as the common law control test.

This is the general statutory construction that I am giving you, gentlemen. The Legislature recognized that it is entirely conceivable that a union and its membership may not be in position to strike against the government but may be in position to assert certain rights under federal law against the substantial control interest. The Legislature recognized in passing (3) that an employee not in position to strike against or to bargain collectively with its governmental master may nevertheless find himself in position to resort to federal recourse against certain supervisory or executive personnel not government employees. It recognized that former public utility employees might be in position to seek federal recourse for mutual aid or protection, absent matters not involving budgetary control. Example: Grievances against such supervisory and executive personnel. In other words, it was the intent of the Legislature that Florida Statute 839.221 be applicable in a situation where government acquires; that is, possesses and completely controls the operation of a utility.

In that instance employees may not belong to organizations which assert the right to strike against the government and may not themselves assert such right. That class of employees is eligible for Civil Service benefits. That is what the statute says. That is exactly what it says, absent (3).

Conversely, where substantial control remains, the County may, because the act is not applicable, employ former employees of a utility company, notwithstanding their union membership, because the act is not applicable to them—and notwithstanding their assertion of the right to strike. This gives them no right to strike against their government because they did not have it before the passage of the statute, but it leaves them in a position to seek federal redress, if such is warranted, against individuals or corporations that may be held, in federal jurisdictions, to be, in fact, their employers.

I think in that connection, gentlemen, that it is important that we read something else from the original statute which is not present to the naked eye in Florida Statutes Annotated. You will notice that in Section 1 it says, "No person shall hold office, employment," et cetera, "who participates in any strike or asserts the right to strike against the state, county or any municipality."

From reading Florida Statutes Annotated, the inquisitive individual construing the statute says, "Does that mean any strike—or does that mean any strike against the government?"

The answer is very simple. The title of the act, the original act, reads as follows: "An act relating to membership," et cetera, "in organizations asserting the right to strike, providing for the prohibition of participation in any strike against the state, county, or any municipality."

Although wholly owned government corporations or "authorities" are exempt under the NLRB's employer definition, government contractors are not exempt, even when they are operating a government-owned business and working with government-owned equipment. The contractor and not the government may be the employer if, in fact, the contractor controls personnel and certain labor relations, even though the government may screen the key or supervisory workers.

Under the contractual relationship between Mr. Pawley and Dade County, between Dade County and the management corporation, and upon the evidence presented here, employees not members of the management corporation would be employees of Dade County, but whether or not for some purpose they may ultimately be held in some other forum to be employees of the management company or the substantial control entity is not for the Court to know. Neither is it for me to speculate upon that.

Possibly the earliest account of such a situation in NLRB history has to do with the Cosmopolitan Shipping Com-

pany in 1937. It was held there that the United States Government in turning over operation and management of government-owned vessels to a private company while contracting to pay actual costs and expenses of the operation had avoided the responsibilities of the employer, of being an employer, and that the exemption of the government from the operation of NLRB was not meant to apply in cases of a commercial venture of that nature.

In 1943 a company known as the Copolymer Corporation, organized for the operation of a government activity, a government-owned plant, under an agreement with an agency of the United States Government, was held to be an employer within the meaning of the act, where there was nothing in the contract between the company and the government agency which rendered the labor relation of the company, other than those pertaining to supervisory employees, subject to the agency's control.

A similar situation was present and an identical ruling was made in 1951 upon a contract involving the Great Southern Chemical Corporation. However, as I say, whether or not the company contracting with the governmental unit may be an employer or, at least, jointly so with the government, within the meaning of the act, turns upon the particular factual circumstances present in each case. There is nothing before this Court on that proposition and no presently justiciable issue—and the management company is not a party to this case.

Further construing the statute in a general vein, it was, of course, not the Legislature's intent that former public utility employees automatically occupy the status and enjoy whatever benefits flow to public employees. The members of the defendant union will not, of course, automatically become government employees upon takeover.

Whether the statute is applicable or not, the one that we are construing, the employees of the former utility com-

pany must first choose to become County employees. In a situation where the company itself is acquired within the language of (4), the County must consider the employees eligible for Civil Service benefits.

Of course, the Legislature cannot legislate that a citizen must go to work for the government (that proposition was taken care of in the 1780's in America by a document known as the Constitution of the United States) save, of course, in national emergencies.

Neither can A and B contract that A will sell and B will purchase the manual services and labors of a third person. That proposition was abrogated shortly after a terrible internal conflict, sometimes referred to as the Civil War and sometimes referred to as the War Between the States, depending upon what part of the country one occupies. In other words, it cannot be done contractually, gentlemen, not since the War Between the States.

Having made findings of fact, having construed the statute, and having rendered conclusions of the Court on doubts sought to be resolved by the plaintiffs' prayer for declaratory decree, the Court now makes certain observations which must be considered purely as such. They are dicta at best.

The Court recognizes full well that its function is not to encourage or to discourage the passage of legislation, not to encourage or discourage the resort to federal boards or jurisdictions, the government operation of public transportation facilities, membership or resignation from unions which assert the right to strike against the government. Its function is not to seek public acceptance of its judgments and decrees. Its function is to stay within its prescribed judicial orbit.

In this instance, it is to resolve bona fide doubts and to construe a statute. I pause here to quote from Justice Brandeis, words which were written forty years ago,

which I think are appropriate: "All rights are derived from the purposes of the society in which they exist. Above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community"—and this is the point I make—"but it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the Legislature, which while limiting individual and group rights of aggression and defense may substitute processes of justice for the more primitive method of trial by combat."

The Court considers, then, the following remarks appropriate in that their purpose, as I say, is to assure the parties here of an understanding of the construction of the statute. They are made only for that purpose and, are no more than observations.

The Court observes that the Legislature anticipated that a county may, as the Transit Authority Chairman expressed it, except and hope that bus company employees who are members of a union that assert the right to strike would accept county employment. In other words, if substantial control exists, the Legislature very wisely made this statute inapplicable to the bus drivers employed at the time of the takeover or to be employed. The Legislature anticipated that if the statute was inapplicable to those employees, the county would be in position to decide what course to take. I have gone to great pains to say to you that it is none of the Court's business what the County does, but the discussion, in my judgment, clarifies the construction of the statute.

The County could do one of several things: It could employ the present bus drivers, should they consent, of course, realizing that there would be no right to strike against the county or to bargain collectively, but employing

them with the knowledge that union members might some day seek some recourse against this substantial control entity in the area of the federal law; or, B, delegate the right to the Transit Authority to enter into contractual agreement with them (not collective bargaining within the labor sense), such agreement to be within budgetary limitations, timewise as well as dollarwise; or, C, Statute 839.221 being inapplicable and no legislative roadblock as to these particular employees, the County may be in position to consider the advisability or lack of it of specific legislative grant in the area of collective bargaining, including or excluding the right to strike; or, D, it may operate the buses through drivers not associated with a union which asserts the right to strike.

It may choose its own employees. The Legislature anticipated all this in the drafting of this statute, which is clear and easy to read.

Interestingly enough, whether this Court holds that there is or there is not substantial control in this instance would be of little or no consequence in any federal proceeding. Such a ruling here serves the purpose of settling the rights of the County, if it wishes to do so, to employ personnel belonging to a union which asserts the right to strike against the County. Whether or not the employee works for the County, as I have said, is up to him and up to the County under this statute and under this factual situation.

I think it is appropriate to note that the maintenance of substantial control in a circumstance such as ours is not unusual in bond proceedings. State and county governments by constitutional provisions must operate on a balanced budget. These bond agreements and programs are ofttimes helpful to a community as a practical matter. There must be some control to cope with the problem of the natural urge of officeholders to satisfy their conconstituents. Example: The urge to reroute a bus six blocks off its beaten path to the benefit of a few con-

stituents; the urge to hire more employees than are necessary to be hired for patronage purposes, et cetera. This Court merely holds that such a relationship renders the statute inapplicable as to a certain class of employees.

I want to make it clear that the Court is not deciding questions regarding the scope or application of County Civil Service regulations. It is not deciding questions regarding the scope or application of County retirement programs. It is not deciding questions relative to rights or status of the parties should the County take over and find at a later time that Mr. Pawley has negotiated bonds so as to become a minority bondholder. Those questions have not been raised. They are not presently justiciable.

In summary, gentlemen, (still observations), Dade County may choose to acquire a public utility, vest the control in elected officials, and operate a public utility free from labor relations problems; or it may take over such a utility by contract, with some substantial control remaining in the seller. It may choose to contract with management companies to manage the utility, thereby enjoying the benefits of such arrangement, and also, thereby, living with whatever inconveniences may develop, because state and county governments cannot deprive American citizens of their right to resort to federal boards and courts given them under the authority of the United States Congress. In any event, the people (and that term includes members of the union), the named defendants, and the elected representatives of the people themselves, each has his choice to make under this statute.

It is the prayer of this Court that the choices are wisely made to the benefit of the community as a whole.

JOE EATON
Circuit Judge
8 Jan 62

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
IN CHANCERY

No. 61C 12832—Eaton

DADE COUNTY, a political subdivision of the State of Florida, and the METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, a governmental entity of Dade County, Florida, *Plaintiffs*,

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, a labor union organization, *et al.*, *Defendants*.

Order Denying Petition for Rehearing

THIS CAUSE came on to be heard on January 29, 1962, upon defendants' petition for rehearing. The Court considered the petition and heard argument by counsel for the parties. Therefore, having been advised in the premises, it is

ORDERED, ADJUDGED and DECREED that:

1. Defendants' petition for rehearing be and the same is hereby denied.

2. Oral ruling and oral opinion upon the completion of oral argument by the parties on January 29, 1962, be and the same are hereby made a part of this order denying petition for rehearing.

DONE AND ORDERED in Chambers, Miami, Dade County, Florida, this 30th day of January 1962.

JOE EATON
Circuit Judge

Oral Ruling and Opinion

THE COURT: The defendants' petition for rehearing is denied.

Gentlemen, in that connection, let me point out to you that fine distinction about which we are talking. In the first place, we have got to remember that we are doing nothing more than construing a state statute, as you say.

Now, this statute is not an anti-strike statute. This statute says that certain people can be employed and certain others cannot be employed. This is the entire statute that we were talking about. It does not deal with the proposition of who can strike and who cannot strike.

From a reading of that statute, although there is substantial control—and this does not mean primary control, does not mean overreaching control, it does not mean more control than the County has. It means something substantial, something more than an illusory proposition, something of substance. It does not mean he has complete control or any percentage of control. It just means he has some.

As an aside, if he did not, he would be a fool, and Mr. Pawley is not a fool.

Of course, my ruling is on the basis of this hearing and not on that observation. However, take Mr. Ed Ball as an example, why the County cannot raise the fare on the Rickenbacker Causeway. Mr. Ed Ball has got to approve that, but those people that work down there are not employees of Mr. Ed Ball's. They are employees of the County.

When you begin to tie in the substantial control ruling as having something to do with striking or not striking—in interpreting that particular statute just for statutory construction is what I am talking about—then people make a serious mistake.

Here is the distinction in the cases that you point out and our instant case: In the first place, the principal reason that this matter is presently justiciable is this: The pleadings say that the Union and the County were in a position, before takeover, before notice of takeover, just by virtue of the Union having been invited to come over and go to work, to have to decide what their initial employment arrangements were to be.

The Union said, "We can bargain collectively with you." The County said, "No. you can't." Now, regardless of whether the notice was ever sent out, whether the County ever takes over or not, that situation makes this presently justiciable. This was not present in any of these cases about which you are talking.

The reason that the Union could not and the County could not bargain collectively—and when I say "not" now, I am talking about this answer to this judicial decree to this complaint that was filed—was that as of the time the controversy arose, the County certainly could not bargain collectively with the Union because of the law with which we are familiar. The Miami Water Works case is the first, and because there is no legislative authority for it to do so and certainly that statute having to do with employment rights did not give them any authority to bargain, so they could not bargain.

Then you say, "But they can because the County has divested itself of its sovereignty."

It has not, for the purposes of construing this statute and to rule on the presently justiciable controversy. It can only divest itself of its sovereignty in the actual operation of a bus company.

That is what gave rise to all of my rulings about what could happen in the actual operation of the company. The presently justiciable situation does not have to do with the actual operation of the bus company.

The only reason that I put all that stuff in there at all about the federal situation was this: The County wants an interpretation of this statute. If I simply say to the County, "You cannot bargain collectively and leave it there, then I have misguided the County by way of declaratory decree, so I add, in order to put at rest their rights and immunities, that depending upon the actual operation, if they ever take over and when they start to operate, then all of these propositions that you are talking about may well come into play.

I have pointed out throughout my opinion that at least it could be said that the management company and the County jointly employ these people, but that depends upon the actual operation of the business. All of these cases have to do with a relationship that comes about operationally.

Here is the position the bus driver is in: He is invited to come to work for the County. This statute—and all I am doing is construing the statute—says that because there is this substantial control, he can have and still keep this union membership. That is all this statute says.

When he does, he immediately becomes a County employee. There is no question about it.

In the case involving the Pentagon, the National Food Corporation case, and in the Cosmopolitan case— Incidentally, the company there received three per cent of the gross revenue. The company did the actual hiring of employees. That Cosmopolitan Company hired them.

In the case in Washington, D. C., in the Pentagon, National Food actually hired them.

In this case, why are they County employees? Because the County sends them out a bunch of material and says, "Come to work for us," notwithstanding Mr. Reynolds' statement that they were looking to the management company for the employees. All of the other evidence bears out that the County had invited them to come over and

accept County employment. When they do that, they do not do that with knowledge of a contract between the County and the management company or with knowledge of a trust agreement. This is not a matter of record which puts them on notice as to who their employer is going to be. They come over, as distinguished from all of these cases we have been reading about, and say, "Here I am, I am a County employee." They then are County employees.

When the actual operation of this thing comes about, I have pointed out that it might well be, although it is not presently justiciable, and it is a federal proposition, that at least one of their employers would be the management company and that they would have all rights granted them under the federal law against an employer, namely, the management company.

I did not wish to anticipate every fact. I tried to stay within the framework of the agreement. I did say they were entitled to all of their recoure. I did go to the trouble to point out the title to this statute that we were construing, which makes it clear that this is a prohibition against joining a union and working for the County when that union asserts the right to strike against the County, but not when it asserts the right to strike against a management company.

The only fine distinction between your argument and my decree is this. Operationally, you may be correct. This is a declaratory decree. This does not anticipate facts having to do with the actual operation of the business. That is the first point. As a matter of fact, the County anticipated strikes because in its contract with the management company it talks about what will happen when there is a strike, if there is a strike.

The County anticipates that if there is a strike, that the County nevertheless will pay certain amounts to the

management company for a certain particular period of time.

Who is the strike against if there is a strike? The same entity that all of these cases talk about. The strike is against the actual employer, the supervisor.

These people in National Food did not strike against the government. They struck against National Food.

These people in Cosmopolitan did not strike against the United States Government. They struck against Cosmopolitan and the federal people said that the government cannot be heard to complain about that indirectly. It suffers the consequences of a strike against an employer. It has divested itself of that. It has assumed the position that strikes may develop against the actual employer and, therefore, it cannot be heard to complain—not that the strike was against it but that the people have struck against Cosmopolitan or that they have struck against National Food, no more than they can be heard to complain here if they ever take over that the Union strikes against the management company if, in fact, it is their employer.

The same as in all of these cases, and that is exactly what I say here.

Can the Union and the County bargain collectively? You say the County has divested itself of its sovereignty. It has not for that purpose because it takes some statutory authority for a county to bargain collectively.

In the California case, the statutory authority came about through a construction of a statute, but the statutory authority was the Railway Labor Act. The statutory authority in California in the bus case was the state statute.

In all instances there is some statutory authority to bargain as far as the county goes. There is none here. There is no federal statute.

There are many rulings that say in the operation of this function the government cannot be heard to complain about a strike against this fellow that is operating this business for him, even though it indirectly hurts the government. There are plenty of cases on that. That is what I pointed out in my opinion, but there is no legislative authority for these people to bargain collectively.

This statute simply is not that authority. It is an employment statute.

So you say, "Well, who does make these arrangements?"

There is no authority. You have not challenged the validity of the contract. The Union has not attempted to set aside the contract as being void against public policy or being an unconstitutional act, without charter or authority.

They said, "All right. If we come and go to work for you, we are County employees because we sign up with the County."

These contracts still remain because you have not attempted to set them aside.

How is this done as a practical matter? The same way it is to be done in all of these other cases. The County by contract anticipated there would be strikes, obviously, or, at least, anticipated the possibility of it. The County said to the management company, "You send us over the budget and we will approve it or disapprove it, but you prepare the budget, Mr. Management Company, and send it over here to me."

The County still gives a percentage of profit to the management company. There is the element of profit that you can work with.

The County says, "You send me over the budget."

If this County has to change its contract with the management company, it is fully authorized by the Constitu-

tion to contract with that company. The management company sends over the budget. The Union is bargaining collectively with its employer, namely, the management company.

The management company says, "Look, County, we are not making enough money this way. Three per cent is not enough. We have got to have prepared a higher budget here. These boys are wanting to take part of my three per cent or they're going to quit driving, they're going to strike against the management company."

The County says, "Well, I got to change my contract, but I guess I am going to have to give you five per cent."

The point is that although the County cannot bargain collectively, having absolutely no statutory authority, the management company, if it, in fact, in the operation of the thing is the employer, could bargain collectively and to adjust its situation with the County by contract.

There is no statutory authority for this County to bargain collectively. This is exactly what my ruling says throughout.

The only way you can construe the statute and not give the County the false information that there could never be any collective bargaining or strikes, which would affect it, is to go further and point out, as I have done, these federal cases that you are talking about, so that at least the statute would not simply say "You have full control over these people and there could be no bargaining or striking because these cases all say that there can be," and that is exactly what this opinion says.

The distinction between your argument and the situation in this case is these people do become County employees initially. There is no question about it. If they should go to work because they agree to it, they would be County employees. It is that simple. They come over there and say, "I am coming to work for you." At that time they

cannot strike against the County directly nor can they bargain collectively with the County.

However, if in the operation of this business they are, in fact, employed by the management company and if the federal people say so—and that is the important thing, because this Court does not have a right to make that determination—that is, a determination for the federal people—if they say so, of course, the County, though it may not bargain collectively, and it does not have to recognize a strike against it, would be in position to suffer the disadvantages, as I have pointed out, of having private enterprise direct and supervise the bus drivers, and, as a matter of fact, their very contract calls these people supervisors.

The test of who the employer is is who supervises under the federal law. It would seem to me that the County has anticipated this and has put in a strike provision as to what their relationship is with the management company. If they do not want the strike and the management company says that it would be to their great advantage to change the contract rather than you having to pay me the X thousands of dollars through the strike, the County is at liberty to contract with its management company.

There might be some question here as to agency or private contractor because if these management people were purely the agents of the County, they might be said to take on some of this immunity as an agent, but if, in fact, they are private contractors, then there is no such immunity available to them.

Again, this is for the federal people to decide and not for the state courts.

The only way you can cut it, a County does not have the authority, the people have not authorized this County to enter into collective bargaining agreements.

Why? Because there is no statute that says so. This one statute certainly does not say so.

As I have said in my opinion, if the County wants to operate these buses like Coral Gables does, they got the authority there to do that, and if they want to operate it through private enterprise and subject themselves to the possibility of strikes and collective bargaining with the private management company under the federal law, they have a right to do that because there are certain advantages to them and, likewise, certain inconveniences that flow, namely, some day somebody strikes against a management company and not the County because the federal people say the management company is a private contractor and the County has given up or divested itself of its employer relationship through the actual operation, as distinguished from these contracts, and then the County is in a position to do that, too, if it wants to do it.

That is what my opinion holds and those are the only distinctions that I see between your argument and my ruling.

Let me just do one or two other things while we are here. You see, the federal recourse is never against the government. The federal recourse comes about because of the employer-employee relationship, and the government is actually removed from the federal recourse, but when they get into business with management, the position that the government occupies comes about not only because it is in business but because of its relationship by choice to the actual employer, who does come under the federal statutes.

That is why I use the words "at least joint employers" somewhere in my opinion.

Here is another thing that the Legislature met when it passed this statute: This statute does nothing more than say to the County, and this is exactly what the legislative intent was, "You may employ certain individuals notwithstanding your knowledge of the fact that they will continue to belong to a union which asserts the right to strike

against the government. You do not have to, but if you do, you put yourself in the position of subjecting yourself to these inconveniences that I have pointed out, not because they can actually strike against you but because they may be held by the federal people to be in position to strike and bargain collectively with the substantial control entity or the management company here," so that when the County reads this statute and still employs members of the Union who assert this right, then they employ them with notice of these disadvantages that obviously are present and which they obviously anticipated.

The statute simply says to the County, "You can hire them, but you hire them with knowledge that they retain their rights under the federal law as a member of this Union."

They cannot say, "I do not assert the right to strike against the County," and then strike the management company because indirectly it is a strike against the County.

A union cannot be in a position to say, "Well, I will work for you and not assert the right to strike against you," and then strike the management company.

The County knows this. They do assert the right to strike against the County and they know it will inconvenience the County if they strike. Nevertheless, that does not give them the right to bargain collectively with the County or to strike the County directly.

That is exactly what notice this statute gave to the County. Their possession in the operation of this business is controlling as to who the employer is at the time they begin to function, if they ever do, with employees who are members of your union. This decree goes as far as it can to give the County its possession under the law, but not so far as to usurp the authority of the federal people, and the only distinction in your argument and this opinion is that you apparently take the position that this statute or

general statutory authority under the federal law gives the County the right to negotiate directly, to bargain collectively, for you to strike against the County directly. I say it does not and cannot, but that if in the operation of this thing the County does not occupy the employer relationship or does, in fact, at least jointly occupy it with private enterprise, that it does it with the notice of what the results may be and they have actually anticipated it to the point of putting into their contract certain strike provisions.

For those reasons, your petition for rehearing is denied.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, FLORIDA
IN CHANCERY

No. 61C 12832

DADE COUNTY, a political subdivision of the State of Florida, *et al., Plaintiffs,*

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, a labor union organization, *et al., Defendants.*

Order on Plaintiffs' Petition for Supplemental Relief

THIS CAUSE came on regularly to be heard upon plaintiffs' petition for supplemental relief, the defendants' motion to dismiss and response to plaintiffs' petition. The Court has heard and considered the testimony, evidence and arguments of counsel for the respective parties, and being otherwise duly advised in the premises, it is thereupon

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That defendants' motion to dismiss the plaintiffs' petition for supplemental relief is hereby denied.

2. The defendants' be and they are hereby enjoined and restrained from striking or continuing any strike for the purpose of coercing the plaintiffs or any other governmental agency to engage in collective bargaining.

3. The Courts oral comments (following the completion of the testimony) at to-days hearing be and hereby are made a part of this order.

DONE AND ORDERED in Chambers in Miami, Florida, this 2nd day of February, 1962.

JOE EATON
Circuit Judge

Oral Comments by the Court

The Court: I want to make a statement. I think it is time that it is said. I will give you my ruling for whatever it is worth.

The founders of this country of ours made it pretty clear that there were three separate branches of this government. One of them was the judiciary, it limited the authority of the judiciary to handle executive and administrative problems. This Court can only perform the function of a court. It cannot solve the problems between the Union and Mr. Pawley or the County and the problem of bus drivers and where they come from, and for a week now the Court has provided an avenue for both sides here to be able to say, "We don't know what we can do until after Friday." You are entitled, both sides are entitled to lean on the Court, to get whatever judicial determination the courts are authorized to enter. The courts do not have the authority to settle executive problems. Neither can they write contracts for labor unions with employees, and when it is put in the position of having presented to it the question of construing a statute and only construing a statute, when the statute is construed, that is all that a state court can do.

It cannot hire 750 bus drivers. It cannot require the entry of a collective bargaining agreement between a labor union and Mr. Pawley.

Now, Mr. Davis is entitled to have this matter considered by the Court and, as a matter of fact, for what it is worth, he is correct in this instance.

Here is the ruling on this situation, and, gentlemen, I do not want to appear to be pompous at all, but it seems to me that this proposition involved is so perfectly obvious that we have simply been providing the interested parties with an opportunity to write and make radio announcements and everybody has had a great opportunity now to figure out what is going to happen after Friday.

Nothing is going to happen after Friday that was not going to happen anyway, in my judgment. However, this is not to say that Mr. Davis does not have every right to present what he has presented because he does and I say he is correct. Here is the decision on this case, and I am not going to rule next week but I am going to rule now.

Gentlemen, when I am prepared to rule, I will say to you that I am now ruling. I will rule very slowly. I will say it one time, and I do hope that I make myself understood about it. I am not going to make the matter difficult because this matter is not difficult at all.

This Court—and I am not beginning the order yet because I will let you know when I am—began simply by construing a statute, which is all in the world it has a right to do under the federal law and under the state law. One side of the case took the position that Mr. Pawley maintains substantial control if there was a takeover under the contractual agreement. The other side said he did not.

Why is it necessary to rule on that proposition? Because whether the statute that I am construing is even applicable or not to the union men depends upon that one factor, and that is why this thing is injected into this case.

I have ruled prior to now that there is no authority, no clear legislative authority for a governmental agency in this state to enter into any collective bargaining agreement with a union or to recognize as valid a strike against it, but that because Mr. Pawley maintains that nominal control, that in my experience all principal bondholders maintain in bonding agreements, and it is not unusual, it is a natural and customary thing—that because he does, this statute which we were construing is not applicable to the members of this labor union because the very statute itself says that it is not. The result of that simply is that the County may, if it wishes, employ these union drivers, where it could not have done so had not Mr. Pawley maintained this substantial control.

The statute is simply a statute which prohibits government from employing anybody that maintains that it has a right to strike against it. Because of this circumstance, the County can employ these people, notwithstanding the face that they maintain a right to strike against the government, because in construing a statute the Court must determine the legislative intent.

The Court then went on to say what (3) means, why it is there, why this peculiar language is there.

It said simply, not deciding whether these people if they are ever employed by the County, working for the management company or Mr. Pawley or the County—not for that purpose because I make it clear that that determination must be made by the federal people, but simply to show why the statute is there and what the Legislature intended, I pointed out that the Legislature intended to leave these labor employees, if they wanted to work for the County and the County wanted to hire them, in position to assert whatever rights they may have under the federal law against any employer that the federal people may some day find to be their employer, in fact, whether jointly with the County or with the employer.

This Court is not in any position and has never ruled who the employer was going to be when these people actually go to work, if they ever do, for a management company or the County, Mr. Pawley. I tried to point out that is not within the jurisdiction of this Court at all. It is simply in describing the statute and determining the legislative intent that this idea comes into the opinion, and this is clearly a National Labor Relations Board or a Federal Court problem.

Now we get down to today. The law is clear that the state has extremely limited authority. We are discussing today state courts in this area.

The only time it has any authority at all to act is when there can be no argument at all as to whether this subject matter of this proceeding falls within the federal act. In my judgment, this is one of the few circumstances that clearly does not and could not fall within the federal act for this simple reason. There is no place, in my judgment, in the federal act, any language, any congressional intent that has to do with a situation where government, who does not operate any business whatsoever, that has to do with these members of this labor union, whether or not the labor union and the County, who does not employ them, for whom they do not have to go to work, the County not being their employers and not operating any industry that they are even remotely connected with—there is no provision in the national act that even remotely touches upon that peculiar set of circumstances.

It was not within the contemplation of the Congress that a government—and not because they are governments because I agree with you on your interpretation of the cases and pointed out to you fellows three or four weeks ago that counties have been held to be persons under that act, if you remember, not because they are government and not simply because there is no employee-employer relationship, but because the act is not designed at all to cover a

situation where a group of individual labor union people who work for Miami Transit Company are engaging in discussions with some governmental agency about what may happen someday if the government ever takes them over. This is not a part of the act.

This is one of the few situations that comes to my mind that is not arguably within that act.

For what it is worth, and as I say, this reminds me of the title to the Shakespearean comedy, "Much Ado About Nothing," frankly, the Union on January 27 adopted a resolution which said that one of its purposes in calling this strike was because of Dade County's refusal pursuant to said contract, combination and conspiracy, to recognize and bargain collectively with the Union as the representative of employees to whom the County is offering jobs.

This is not within this Court's jurisdiction because the strike is called for an unfair labor practice. That would seem to take it completely out of the Court's jurisdiction.

However, because that is a valid reason for a strike, and it is clearly recognized under the federal law as being an entirely lawful purpose, because that is—that does not mean that everything connected with the alleged unfair labor practice must necessarily be within the confines of the federal act because it is not, and because of the Union's statement in No. 5, the Respondent's Exhibit No. 5, that that is one of the many purposes, and I realize that it is in the context of being part of an alleged unfair labor practice—nevertheless, that is enough to give the Court that limited jurisdiction to restrain the Union as to that one particular circumstance.

This does not reach the strike itself. Those matters that are properly before the federal people, and relying upon the case that the County itself relied upon, and there are two or three that they cite there, and relying upon Mr. Davis' own statement, the most that this Court can do is

to restrain the defendants from engaging in any strike or concerted activity which has as its purpose the coercion of the governmental entity, the County, from entering into a collective bargaining agreement with the Union.

Now, that is the extent of the order. That is all that has been sought. It is so ordered.

To repeat it, the members of the Union, the defendants, are hereby restrained from engaging in any type of strike or concerted activity which has the purpose of coercing the plaintiffs into entering into a collective bargaining agreement with the defendants.

I point out that that is done, entered as of now, when Dade County is not the employer of these men, when they may never be the employer of these men, when there is not operative in any way any bus company under the direction of the County entity at all.

The Court has ruled that under those circumstances they cannot bargain collectively, one with the other, and, therefore, any strike which has as one of its purposes the ones stated here in Respondent's Exhibit No. 5 would be enjoined, and is so enjoined.

Mr. Davis, you will draw me an appropriate order on it, present it to me. We all understand that this does not make the buses run. It simply removes from the picture what this Court finds to be an illegal purpose and leaves the Union to all of the rights granted it by the federal congress under the labor act.

APPENDIX B

The Labor Management Relations Act, 1957, 61 Stat. 136, 29 U.S.C. § 141, *et seq.*, provides as follows:

Section 151. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce, by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by re-

storing equality of bargaining power between employers and employees.

Section 152. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

Section 153. (d) There shall be a General Counsel of the Board who shall be appointed by the President, by and

with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or has may be provided by law. * * *

* * * * *

Section 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * * .

Section 158. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Section 159. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: • • • .

Section 160. (a) The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

• • • • •

Section 163. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 388

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, *Petitioner*

v.

DADE COUNTY, a political subdivision of the State of Florida, and the METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, a governmental entity of Dade County, Florida, *Respondents*

MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR WRIT OF CERTIORARI

BERNARD CUSHMAN
5025 Wisconsin Avenue, N. W.
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1411 K Street, N. W.
Washington 5, D. C.

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Now comes petitioner and respectfully moves for leave to supplement as follows the petition for writ of certiorari herein:

1. Petitioner respectfully calls attention to the appended front page article in the Wall Street Journal of September 22, 1964, describing recent proliferation of the technique of acquiring government ownership through long term leases with payments of rent applied to the purchase price. The technique enables "the government involved to assume ownership when the lease expires." (Emphasis added in text.)

If such a lease were to vest independent control over operation of the facility in the private lessor and make the lessee's rent "obligation" contingent on profits, the transaction would be practically and legally indistinguishable from the instant case. If the parties attempted, incident to such a lease, to substitute local for federal authority over labor relations by proclaiming employees of the leased facility "government employees," the question of survival of National Act coverage would be identical.

Thus, the Journal survey provides concrete confirmation of the widespread potential of the Dade County gambit to defeat federally guaranteed collective bargaining in private public utilities *prior* to *actual* government ownership and operation.

2. Since filing of the petition herein a petition for writ of certiorari has been filed in *International Association of Machinists* v. *United Aircraft Corporation*, No. 533, this Term, which raises a cognate question concerning the impact of inaction by the General Counsel of the Board upon state court jurisdiction in preemption and conflict cases. Cf. p. 21, n. 15, of the Petition in No. 533 with p. 29 of the Petition herein.

Respectfully submitted,

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THE WALL STREET JOURNAL

Tuesday, September 22, 1964

Bypassing Voters

More States, Localities Avoid Bond Elections By Renting Facilities

Pension Funds, Other Bodies Do the Building; Argument Rages on Costs, Legality

Speedy Construction a Gain

By DONALD A. MOFFITT
Staff Reporter of THE WALL STREET JOURNAL

SAN FRANCISCO—On Oct. 6 citizens of Santa Cruz County, Calif., will ballot on a $4 million bond issue to build a new court house. But they won't accomplish much if they vote no. County supervisors already have made plans to get the court house built anyway—by a method that may well cost taxpayers more than the bond issue would.

The technique they are considering is an old one that's being revived by a growing number of cities, counties and even states to bypass the voters who have been defeating an increasing number of bond issues lately. It's a two-step procedure:

First, find somebody else to build the court house, school, jail, office building, golf course or whatever it is that's involved. That "somebody" can be a public employes' pension fund or a non-profit corporation created for the purpose. It can even be a governmental agency empowered to issue bonds of a type other than the "general-obligation" issues that must be approved by voters.

A Current Obligation

Then, rent the facility under a long-term lease that provides for the government involved to assume ownership when the lease expires; in most cases, this rent can be partially applied to the purchase price of the facility. Legally, rent payments under such a lease usually have been held to be a current government obligation, payable out of general tax revenues, with no special voter approval required. This is true even though the lease usually obliges the government involved to pay rent for quite as many years as it would have to pay interest on a voter-approved bond issue. It's even true if the rent payments go to pay interest and principal on "revenue" bonds issued by whatever body built the facility, as they often do.

But leasing arrangements nevertheless have been spreading as government officials have found it increasingly difficult to win bond elections. Santa Cruz County will set no precedent if it leases a court house citizens voted not to build. A few localities already have used the leasing technique to, in effect, reverse the results of a bond vote.

Bonds No—But Court House Yes

When the 58-year-old court house at Santa Rosa, Calif., was condemned as unsafe a few years ago, Sonoma County officials went to the people five times in three years with proposed bond issues to build a new one; the citizens voted down all five. But workmen nevertheless are now putting finishing touches on a new $4 million court house and jail. The county established a non-profit corporation to borrow money, build the facility, and lease it to the county.

In Los Angeles County, male lawbreakers are hauled off to a $17 million jail, built under a leasing arrangement after voters defeated a bond issue that had been proposed for its construction.

To be sure, such cases are still rare. Far more often, public officials arrange to have facilities built under leasing arrangements without ever putting a bond issue proposal up for a vote.

But many are frank to admit that they are turning to leasing because they fear a bond issue would be defeated. And their fears are far from groundless. Voters did defeat 37% of the $5.8 billion in state and municipal bond issues that were put up for approval last year, according to the Daily Bond Buyer, an investors' publication. That's up from a rejection rate of 30% in 1962, and only 25% in 1958.

"In the Midwest, we broke out with a rash of public rejections of general-obligation bonds," says William Ford, executive director of the Illinois Building Authority. "Some means had to be found to provide needed facilities."

Revenue Bonds Are Different

This building authority was organized by Illinois last year to become that "means." So far it has sold $25 million in revenue bonds. The money is being used, among other things, for buildings and equipment to be leased to state colleges and universities, and for a new penitentiary to be leased to the state prison system.

Revenue bonds are retired from income of the specific facilities built or acquired with bond proceeds. In many cases that income consists only of the rent paid by the government leasing the facilities. Nevertheless, revenue bonds legally are in a different class from general-obligation bonds, which are backed only by the "full faith and credit" of the government unit issuing them; unlike these bonds revenue bonds usually don't re-

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As can well be imagined, this technique has been assailed vehemently by taxpayers, legal writers and even some judges—though more judges have upheld it when irate taxpayers have brought suit.

Even many governments using the leasing technique profess to dislike it, largely because of its cost. The effective interest rate on leases of government facilities ranges from a fraction to a full percentage point above the very low interest rate on general obligation bonds, which currently averages 3.3%.

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"We haven't had a successful bond election for general public buildings since 1940," says John R. Leach, deputy chief administrative officer of Los Angeles County. "The voters will only go for things like hospitals and juvenile wards." General-obligation bond issues in the county must be passed by a two-thirds majority, and officials say the county's urban sprawl makes such a majority exceedingly difficult to get. Voters in one part of the county, they say, won't approve bonds that would go to build a court house or golf course

in another part of the county that may be 30 or 40 miles away.

So officials have taken advantage of a 1949 state law allowing public employes' retirement funds to invest in real estate sold or leased to governments. In the past six years the Los Angeles County Employees Retirement Association has built projects costing $87 million, including the $17 million men's jail and a $1.4 million golf course. It has spent $34.6 million on projects now under construction, including five more golf courses, underground parking lots and a court house, and has committed another $25 million for future projects.

All these projects are being or will be leased to the county. Thus they will add to county lease-purchase obligations that taxpayers already are feeling in the pocketbook. It's estimated that rent obligations, plus amounts set aside for eventual purchase of the rented facilities, account for nearly 20% of the increase in the county's property tax rate since 1959. The Los Angeles County rate currently is $2.40 per $100 assessed value, up from $2.09 in 1959; of the 31-cent increase, it's estimated, six cents was made necessary by lease-purchase commitments.

Some still bigger projects are now being planned for building under lease arrangements. Alameda County and the City of Oakland plan to lease jointly a $25 million sports coliseum being built by prominent local citizens (they include William F. Knowland, Barry Goldwater's state campaign manager).

Big Chicago Lease

Chicago and its surrounding Cook County will lease jointly an $87 million civic center which will house offices of many county and city departments. The center is being erected by Chicago's Public Building Commission, which sold revenue bonds to finance it.

Though no over-all measure of the trend is available, Alan V. Barlett, statistician for the Bank of America, estimates that in California alone the state and local governments have incurred "substantially more" than $200 million in lease-purchase obligations. But he complains that "nobody can find out what the debt is precisely, since most of it is relatively recent and municipalities don't report it as debt."

The municipalities are within their rights, under a California supreme court decision, in taking this view of leasing arrangements. In some other areas, however, there's still a question as to where leases belong in the legal distinction between current obligations of a Federal judge termed the classification of lease rentals as current obligations "a proposition in legal metaphysics that I cannot comprehend." Several legal writers are attacking it currently on essentially the same basis.

But this view is losing ground. A legal survey, already somewhat outdated, found that leasing of schools had been upheld recently in five states and ruled illegal in only two, while specific leasing arrangements for various other kinds of facilities had been upheld in all five states in which they had been challenged. The survey did find that state building authorities created to lease facilities to state agencies had been held valid in only four states and invalid in six, but the situation in one of the six, Illinois, has changed since the survey was taken. An Illinois building authority established in 1941 was held to be unconstitutional but the authority organized last year was held to be valid under a constitutional 1961 state law.

Other Criticisms

Legal technicalities aside, critics have other arguments against leasing. One, of course, is what they view as the questionable ethics of bypassing voters. Another, and frequently bitter, argument is based on cost. James M. Wiley, manager of Dean Witter & Co.'s municipal bond department and a resident of California's Alameda County, combines the two in attacking the county's plan to lease the new $25 million sports coliseum jointly with Oakland.

The county, says Mr. Wiley, is "being saddled with substantial non-voted debt and unnecessarily heavy taxes for years to come." He calculates the proposed 35-year lease on the coliseum will cost county taxpayers 4% in yearly interest for a total interest cost of $21,655,000. A 25-year, 3.5% issue of general obligation bonds, he says, would cost only $10,237,500 in interest.

The interest rate on lease rentals is calculated in different ways. If the organization building a facility issues revenue bonds, the government leasing the facility pays rent high enough to pay the interest on those bonds. If no bonds are involved, the government and the building organization simply agree on an interest rate in negotiations. When pension funds are involved there may be legal requirements; California law, for instance, specifies that pension funds must receive interest on their investments of at least three-quarters of one percentage point more than the going rate on U.S. Government bonds. The state consequently is paying nearly 5% interest on some of its leases of public buildings.

says William E. Davis, assistant county administrator. Since he estimates construction costs are increasing 5% to 8% yearly, he contends a speedy start under a leasing arrangement will save enough on building costs to offset part of the extra interest cost—besides which the county will save the several hundred thousand dollars it would cost to hold an election.

Alameda County, says Mr. Davis, already has saved money because of the flexible construction timing that leasing arrangements permit. The construction contract for a welfare building that the county leases from an employes' pension fund, he says, was awarded some years ago when there was a "minor slump in the construction industry. As a result, the low bid was $300,000 below the cost estimated by the architect. This was a very significant saving to the taxpayers."

Avoiding Complications

Robert W. Christensen, executive director of the Chicago Public Building Commission, says Chicago will lease its new $87 million civic center jointly with Cook County largely because the participation of two government units would make general-obligation bond financing complicated. Obviously the situation would be snarled considerably if Chicago voters approved a bond issue for the city's share of the project while county voters turned down a bond issue for their share, or vice versa. Leasing, he says, not only gets around this but provides a simple method of splitting the costs; county and city each pay rent on the offices they will use in the center.

In some areas, leasing has gained ground because state constitutions severely limit the amount of general-obligation bonds government units can issue even with voter approval. The Pennsylvania constitution limits bonded debt of school districts to 2% of their assessed valuation. Harold O. Spiedel, acting deputy superintendent of public instruction, says this is so little that "if some of our school districts had to go to general-obligation bonds, they just wouldn't be able to build anything at all."

Pennsylvania law permits school districts to establish non-profit "municipality authorities" to issue revenue bonds, build schools with the proceeds, and lease the buildings to school districts. A state-wide school authority operates in much the same manner, leasing schools to districts that, for one reason or another, don't wish their own authority. Since 1952, just under $2 billion worth of Pennsylvania school construction has been financed through these agencies, nearly two-thirds of it in the past six years.

state law allowing public employes' retirement funds to invest in real estate sold or leased to governments. In the past six years the Los Angeles County Employees Retirement Association has built projects costing $87 million, including the $17 million men's jail and a $1.4 million golf course. It has spent $24.6 million on projects now under construction, including five more golf courses, underground parking lots and a court house, and has committed another $25 million for future projects.

All these projects are being or will be leased to the county. Thus they will add to county lease-purchase obligations that taxpayers already are feeling in the pocketbook. It's estimated that rent obligations, plus amounts set aside for eventual purchase of the rented facilities, account for nearly 20% of the increase in the county's property tax rate since 1959. The Los Angeles County rate currently is $2.40 per $100 assessed value, up from $2.09 in 1959; of the 31-cent increase, it's estimated, six cents was made necessary by lease-purchase commitments.

Some still bigger projects are now being planned for building under lease arrangements. Alameda County and the City of Oakland plan to lease jointly a $25 million sports coliseum being built by prominent local citizens (they include William F. Knowland, Barry Goldwater's state campaign manager).

Big Chicago Lease

Chicago and its surrounding Cook County will lease jointly an $87 million civic center which will house offices of many county and city departments. The center is being erected by Chicago's Public Building Commission, which sold revenue bonds to finance it.

Though no over-all measure of the trend is available, Alan V. Barlett, statistician for the Bank of America, estimates that in California alone the state and local governments have incurred "substantially more" than $200 million in lease-purchase obligations. But he complains that "nobody can find out what the debt is precisely, since most of it is relatively recent and municipalities don't report it as debt."

The municipalities are within their rights, under a California supreme court decision, in taking this view of leasing arrangements. In some other areas, however, there's still a question as to where leases belong in the legal distinction between current obligations of a government and long-term debt

The Legal Problem

And the question is crucial. Most states prohibit officials of either the state or local governments from incurring debts of more than a year—or, at least, debts that come due after the expiration of the officials' terms in office—without express voter approval. If leases were to be placed in this category, officials would have to arrange elections on leasing arrangements just as they do on general-obligation bond issues.

A good many people would like to put leases in this class. As far back as 1868, a [illegible] currently on essentially the same basis.

But this view is losing ground. A legal survey, already somewhat outdated, found that leasing of schools had been upheld recently in five states and ruled illegal in only two, while specific leasing arrangements for various other kinds of facilities had been upheld in all five states in which they had been challenged. The survey did find that state building authorities created to lease facilities to state agencies had been held valid in only four states and invalid in six, but the situation in one of the six, Illinois, has changed since the survey was taken. An Illinois building authority established in 1941 was held to be unconstitutional but the authority organized last year was held to be valid under a constitutional 1961 state law.

Other Criticisms

Legal technicalities aside, critics have other arguments against leasing. One, of course, is what they view as the questionable ethics of bypassing voters. Another, and frequently bitter, argument is based on cost. James M. Wiley, manager of Dean Witter & Co.'s municipal bond department and a resident of California's Alameda County, combines the two in attacking the county's plan to lease the new $25 million sports coliseum jointly with Oakland.

The county, says Mr. Wiley, is "being saddled with substantial non-voted debt and unnecessarily heavy taxes for years to come." He calculates the proposed 35-year lease on the coliseum will cost county taxpayers 4% in yearly interest for a total interest cost of $21,655,000. A 25-year, 3.5% issue of general obligation bonds, he says, would cost only $10,237,500 in interest.

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For the Defense

Government officials have several arguments for leasing, besides the contention that it is the only way they can get facilities they need greatly but that aren't glamorous enough to appeal to voters. While many concede that leasing is costly, some argue that it isn't as costly as a simple comparison of interest rates would make it appear, and that in some cases leasing actually may save money.

If Alameda County were to hold a bond election for the new sports coliseum it will lease jointly with Oakland, the start of construction would be delayed a year or more, has saved money because of the flexible construction timing that leasing arrangements permit. The construction contract for a welfare building that the county leases from an employes' pension fund, he says, was awarded some years ago when there was a "minor slump in the construction industry. As a result, the low bid was $300,000 below the cost estimated by the architect. This was a very significant saving to the taxpayers."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 388

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267,
Petitioner,

vs.

DADE COUNTY, a political subdivision of the State of Florida, and the METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, a governmental entity of Dade County, Florida,
Respondents.

(On Petition for Writ of Certiorari to the Supreme Court of the State of Florida)

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the Supreme Court of Florida sought to be reviewed is reported by memorandum decision at 166 So.2d 149. Such order dismissed for want of jurisdiction an appeal taken by the petitioner herein to review the

decision of the District Court of Appeal of Florida, Third District, reported at 157 So.2d 176. The decision of the District Court of Appeal affirmed in part, reversed in part, and remanded for further proceedings a final decree and opinion of the Trial Court (Circuit Court of Dade County, Florida) reported at 19 Fla. Supp. 69.

Connected cases dealing with this same controversy are reported in *Division 1267, Amalgamated Association, etc.*, v. *Ordman*, 320 F.2d 729 (1963); *State of Florida* v. *Dade County*, 142 So.2d 79 (Fla. 1962); and *Hardy* v. *O'Grady*, 159 So.2d 908 (D.C.A. 3d Fla. 1964).

JURISDICTION

The jurisdiction of this Court ostensibly is invoked under the provisions of 28 U.S.C., Section 1257, to review a state court decision that construed and applied state law in determining the status, relationship and rights of the parties under contract documents providing for the purchase of a bus transportation system by Dade County, a political subdivision of the State of Florida. The state court disagreed with petitioner's contention that the Labor Management Relations Act prohibits the state court from exercising jurisdiction in respect to the subject matter of this controversy. Petitioner's contention apparently is predicated upon the conclusion that a proper interpretation of the contract documents involved indicates that the County is not actually the owner of the bus transportation system, because the former private owner maintains a substantial financial or operating control of the transit facilities, and therefore, the exemption of states or political subdivisions thereof from coverage of the Labor Management Relations Act is not applicable to Dade County, Florida.

QUESTIONS PRESENTED

1. Whether the several contract documents governing the purchase of a bus transportation system by Dade County, a political subdivision of the State of Florida, may be reasonably construed to vest in the former private owner such control as to make the County and its employees arguably subject to coverage of the National Labor Relations Act.

2. Whether a state court is deprived of jurisdiction to construe and apply state law in a controversy involving the right of a labor union to bargain collectively with and strike against a county government, where the General Counsel of the National Labor Relations Board, after full investigation and study, rules that "the County is the employer of the employees who are or will be engaged in the operation of the transferred transit system; that the statutory exemption in Section 2 (2) of the National Labor Relations Act is applicable; and that the sale and purchase arrangements between Pawley and Dade County do not require a different conclusion"; and recognizes the state court litigation; and where the federal court upheld the action of the General Counsel.

STATUTES INVOLVED

Relevant provisions of the Labor Management Relations Act are set out in the appendix to the petition for writ of certiorari. Section 839.221, Florida Statute 1959, which was construed and applied by the state court, is as follows:

> "839.221 *Governmental officers and employees; prohibited participation in strikes or membership in*

organizations that assert right to strike against government employer.—

(1) No person shall accept or hold any office, commission or employment in the service of the state, of any county or of any municipality, who:

(a) Participates in any strike or asserts the right to strike against the state, county or any municipality; or

(b) Is a member of an organization of government employees that asserts the right to strike against the state, county or any municipality, knowing that such organization asserts such right.

(2) All employees who comply with the provisions of this section are assured the right and freedom of association, self-organization, and the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a vocational or a labor organization.

(3) In the event that any public utility owned and operated by a private person, firm or corporation is taken over on or after May 1, 1959, by the state, a county or a municipality but in fact said person, firm or corporation maintains a substantial financial or operating control, said persons then employed or to be employed shall be excluded from the operation of this section.

(4) Upon the acquisition of any public utility system from a private person, firm or corporation by

any state, county or municipal government, then and in that event the employees of such private person, firm or corporation other than executive or management staff, shall be eligible to be included in classified civil service and other benefit provisions and systems of that governmental unit."

STATEMENT

This litigation necessarily involves review and interpretation of the contract documents and written instruments evidencing the transaction under which Dade County, Florida, purchased and presently operates a unified bus transportation system for the benefit and convenience of its residents and tourists. This is so, because the contract documents provide the only sound basis for determining whether or not there is any real substance to the petitioner's contention that this transaction does not constitute a county-owned and operated transit system whose labor relations are by definition expressly excluded from the coverage of the National Labor Relations Act. Accordingly, the controlling provisions of the contract documents heretofore considered and construed by the state and federal courts and the General Counsel of the National Labor Relations Board are summarized hereinafter. In the absence of availability of a printed record, references are to the Joint Appendix utilized in the state court, referred to in the petition for writ of certiorari at page 4.

A. The Sale and Purchase Transaction.

1. County Ordinance Creating the Metropolitan Dade County Transit Authority.

On August 2, 1960, the Board of County Commissioners of Dade County, Florida, under its home rule powers en-

acted Ordinance 60-21 announcing its determination to establish "a comprehensive, unified mass transit system in Dade County * * * for the convenience, benefit and welfare of * * * its citizens" (J.A. 24). The ordinance refers to "the unique and troublesome economic problems attendant upon * * * operation" of an efficient private transit system in a county area made up of "numerous separate municipal corporations and unincorporated populated areas * * * [with] overlapping and divided regulatory agencies * * *" and expresses a legislative intent to "provide for the appropriate purchase, acquisition, development, operation, and maintenance of an adequate unified mass transit system by the County upon a self-liquidating and self-sustaining basis" (J.A. 25). To carry out this intent, the ordinance provides for the establishment of a "Metropolitan Dade County Transit Authority" consisting of five members appointed by the Board of County Commissioners with authority to operate and maintain all transit systems acquired by the County "under the direct supervision and control" of the County Commissioners and "subject to the policies established by [them]" (J.A. 37). Specifically, the Transit Authority is authorized to investigate and make recommendations concerning the acquisition and financing of any transit systems, to fix or modify rates or other charges for the use of any transit facilities acquired by the County, and to make rules and regulations concerning the operation and maintenance of the system, subject to the covenants in any outstanding revenue bond indentures and the requirement that the Transit Authority "shall always provide rates * * * adequate in amount to produce sufficient revenue to maintain the transit system on a self-sustaining basis" (J.A. 31-36).

The ordinance further provides that "no County tax funds shall be expended by or for the Authority"; that "all

revenues derived * * * from the operation of any transit system * * * shall be deposited in appropriate special trust fund accounts in the name of the County," to be disbursed "by means of County warrant issued by the County Finance Director"; and that "no such funds shall be utilized for any purpose other than for the acquisition, operation, maintenance, or improvement of transit systems owned by the County" (J.A. 33-34). Finally, the ordinance provides that "whenever the County acquires existing transit systems * * * to the extent necessary or feasible for the economical operation of such facilities, all of the employees of such acquired transit system whose duties pertain to the facilities acquired shall be employed in comparable positions in the County service, [that their] * * * pay status, seniority, vacation and sick leave rights shall be preserved and maintained to the fullest possible extent, [and that] all employees of the Authority shall be deemed * * * County employees and shall be entitled to all the rights, privileges and benefits" attendant on County employment (J.A. 35).

2. Feasibility Report of Consulting Engineers.

On March 17, 1961, and September 29, 1961, a firm of consulting engineers, Coverdale & Colpitts, issued reports requested by the Transit Authority on the projected acquisition and unified operation by the County of four transit companies owned by W. D. Pawley. These reports predicted profitable county operation, foreseeing savings on injury and damage claims, operating taxes, and other expenses that would offset an anticipated increase in wage costs. In addition, construction of a centralized garage was planned, which would save approximately $145,000 a year. Other advantages, such as "free interchange of personnel and equipment," were anticipated through centralized county operation. Purchase of the remaining

three bus lines in the County from their owners was also apparently contemplated.

3. Agreement for the Sale and Purchase of Transit System.

On May 17, 1961, the County, acting upon the recommendation of the Transit Authority, entered into a contract with Pawley for the purchase of his four companies (J.A. 38-54). Under the terms of this agreement, the County agreed to purchase all of Pawley's shares in these companies for $7,705,274, minus the liabilities outstanding at the hour of closing (the companies' liabilities totalled $2,839,961.90 as of March 31, 1961). Pawley was to be paid $300,000 of this amount in cash from the proceeds of the sale of certain transit properties not needed for the County's operations. The rest of the net purchase price was to be paid Pawley in county revenue bearing interest at a rate not exceeding 5 percent per year. After judicial validation, Pawley was to receive bonds in the aggregate principal amount of the net purchase price, minus the $300,000 that was to be paid him in cash. The remaining bonds were to be sold for cash on the open market. The proceeds from the sale of these bonds were to be used to construct a central garage and to supply capital with which to begin operations.

Thus, under the terms of the sale and purchase agreement the $9,000,000 Dade County Transit Revenue Bonds were to be disposed of in the following manner:

Total Bond Issue			$9,000,000.00
Agreed Purchase Price		$7,705,274.00	
Less Liabilities	$2,839,961.90		
Less Cash Payment	300,000.00		
	$3,139,961.90	3,139,961.90	
Bonds to be delivered to Pawley for net purchase price		$4,565,312.10	4,565,312.90
Bonds to be sold on market			$4,434,687.90

The purchase agreement also provided that none of these bonds should mature later than 15 years from the date of the purchase agreement, that the principal and interest on the bonds should be payable solely from operation of the transit system, and that the bonds should be issued under a mutually satisfactory trust indenture.

4. Trust Agreement.

On October 1, 1961, the County executed a trust indenture with the Bankers Trust Company and the Miami Beach First National Bank as trustee and co-trustee, respectively (J.A. 184-198). The trust agreement provides that Special Revenue Transit Bonds shall issue under, and be secured by, it in the aggregate principal amount of $9,000,000 to mature serially in the 15 years between 1962 and 1977, with the face value of the bonds scheduled to mature each year increasing as the interest due on the outstanding bonds diminishes. Thus, in 1963, bonds are to mature in the principal amount $415,000, with the interest due that year totalling up to $450,000 (5 percent of $9,000,000); while in 1977, the last of the bonds are to mature in the principal amount of $825,000, with the interest due that year totalling no more than $41,250 (5 percent of $825,000). Additional bonds may be issued under the provisions of the trust agreement for improvement of the transit system or refunding of the debt if such issuance is specifically authorized by county ordinance.

The bonds are to be held in trust pending their validation and the filing of documents evidencing the meeting of certain conditions precedent to the satisfaction of the County Attorney or the Clerk of the Board of County Commissioners. Thereafter, the trustee is to deliver the bonds to Pawley and the bond purchasers in the manner provided in the purchase agreement.

The trust agreement provides that the trustee shall deposit specified portions of the premium proceeds of the bond sales with the co-trustee to the credit of a Dade County Transit System "Operating Fund," "Construction Fund," and "Equipment Reserve Fund". Any balance is to be deposited to the credit of a Dade County Transit System "Improvement Fund".

Thereafter, funds derived from county operation of the transit system are to be deposited with the co-trustee to the credit of a Dade County Transit System "Revenue Fund". The co-trustee is to channel sums from this fund in to the other transit system funds in accordance with the provisions of the trust agreement and the current county budget, and pursuant to authorization by the Finance Director of Dade County, the superintendent of the transit system, the Chairman and Vice-Chairman of the Board of County Commissioners, and the consulting engineers. Moneys are to be paid out of these funds upon requisitions signed by the County Finance Director and the transit superintendent.

The trustees may be removed under the trust agreement by a vote of a majority of the bondholders or for breach of duty, by any court of competent jurisdiction upon the application of the Board of County Commissioners or the holders of not less than 5 percent in aggregate principal amount of the bonds. New trustees, whose qualifications meet the requirements of the trust agreement, may be named by the Board of County Commissioners or by a majority of the bondholders, with the latter's choice taking precedence.

The trust agreement also establishes certain guarantees for the economic and efficient running of the transit system until the bonds have been paid off by revenues derived

from its operation. For example, the County covenants that it will provide free transportation only in certain limited situations, that "the Current Expenses incurred by the Transit Authority in any fiscal year will not exceed the reasonable and necessary amount thereof, and that the County will not incur any obligations for maintenance repair and operation in excess of the amounts provided for current expenses in the appropriate [county] budget". The County further covenants that "the Transit Authority will establish and enforce reasonable rules and regulations governing the use of the Transit System and the operation thereof, that all compensation, salaries, fees and wages paid by the Transit Authority in connection with the * * * operation of the Transit System will be reasonable, that no more persons will be employed * * * than are necessary for the efficient and economical operation of the Transit System, that it will maintain and operate the Transit System in an efficient and economical manner * * * and that, from the Revenues thereof, it will at all times maintain the same in good repair and in sound operating condition * * *".

In addition, the County covenants that the Transit Authority will employ as consulting engineers, under the trust agreement "an independent engineer or engineering firm or corporation having a nationwide and favorable repute for skill and experience in such work" and that it will secure the written approval of the trustee before employing anyone other than Coverdale & Colpitts in this capacity. Certain functions of the consulting engineers under the agreement are advisory, designed to aid, but not restrict, the Transit Authority in establishing sound fiscal and operational policies for the transit system. Thus, the consulting engineers are to submit a report to the Transit Authority at least once a year setting forth findings on the condition, repair, and operation of the properties of the

transit system and their recommendations for the ensuing fiscal year, on: (1) the proper maintenance, repair and operation of the system; (2) the appropriations which should be made for such purposes; (3) the insurance to be carried under the trust agreement; (4) the amounts to be deposited in the Damage Reserve Account, the Equipment Reserve Fund, and the Renewal and Replacement Fund; and (5) any "necessary or advisable revisions of the rates, fares and charges". In return, the County covenants to keep the consulting engineer (as well as the bondholders and trustees) apprised of the current operations of the transit system by means of monthly audits and reports.

Particular aspects of the County's operation of the transit system that could adversely affect the security of the bondholders' investment are subject to the approval of the consulting engineers. For example, the County covenants that the Transit Authority "will maintain a practical insurance program, with reasonable terms, conditions, provisions and costs, which the Transit Authority determines, with the approval of the Consulting Engineers, will afford adequate protection against loss caused by damage to or destruction of the Transit System". Similarly, the County covenants neither to alienate any transit properties nor to permit the Transit Authority to do so, unless it determines, with the approval of the consulting engineers, that the articles to be sold are no longer necessary or useful to the operation. The plans and specifications adopted by the County for the construction of a central transit system garage are also to be approved by the consulting engineers.

With respect to the transit system rates, the County covenants that, in beginning operations, it will place in effect the rates presently being charged by the companies

or such other rates "which the Consulting Engineers shall have certified will not in their opinion produce less Net Revenues than those estimated in their report * * * [of September 29, 1961]." Thereafter, the County covenants to make such rate adjustments "as may be necessary or proper" to produce sufficient revenues to meet its maintenance and expense requirements, its current expenses, and its bond retirement and interest commitments; but not to "revise any schedules of rates and charges until after receiving the recommendations of the Consulting Engineers".

The County may refuse to institute rate increases recommended by the consulting engineers or may institute increases that are not recommended. It is encouraged to follow the rate recommendations of the consulting engineers, however, by a provision in the trust agreement that excuses any default in bond payments, provided these recommendations have been followed. On the other hand, even though the consulting engineers have approved the rates charged, if they are not sufficient to meet the requirements of the operation as specified in the trust agreement, the holders of not less than 5 percent in aggregate principal amount of the bonds then outstanding may institute an action in a court of competent jurisdiction to compel the Transit Authority to revise the rates in accordance with these requirements.

Additional remedies are provided in the trust agreement for the breaching of the covenants incorporated in the agreement. Thus, upon the occurrence and continuance of any one of a specified list of unexcused instances of default, the trustee "may, and upon the written request of the holders of not less than 20 percent in aggregate principal amount of the bonds then outstanding shall, by notice in writing to the County, declare the principal of all the

bonds then outstanding to be immediately due and payable." Further, upon the occurrence and continuance of such a default, the trustee may, and upon the written request of the holders of not less than 10 percent in aggregate principal amount of the bonds then outstanding shall, proceed to protect and enforce its rights and the rights of the bondholders by such "suits, actions or special proceedings in equity or at law, either for the specific performance of any covenant or agreement contained herein or in aid or execution of any proper legal or equitable remedy, as the trustee, being advised by counsel, shall deem most effectual to protect and enforce such rights."

The trust agreement also provides for the County's employment of a "management agency," specifying the National City Management Company for the job, initially.

5. Management Services Contract.

On July 25, 1961, the Transit Authority entered into a contract with National City Management "to furnish all professional services reasonably required by the Authority for the management and supervision of all public passenger transportation systems and facilities under * * * [its jurisdiction]" (J.A. 64-75). The management agency is to prepare annual operating budgets for the transit system, subject to the review of the Transit Authority and the Board of County Commissioners, and to make appropriate recommendations "relative to any changes in routes, schedules, and fares desirable for more efficient and economical operation of such public transportation systems and facilities".

Under this agreement, the management agency is to provide the supervisory personnel to regulate the "day-to-day" operations of the transit system on behalf of the County, supplying the "technical know-how" with re-

spect to running such an operation that the County lacks. For example, the management agency is to set bus routes and schedules, assign drivers to their runs, keep attendance records, and establish equipment maintenance and repair procedures. On the other hand, the County Personnel Department, and not the management agency, is to handle all matters connected with the hiring of the transit system's employees, including the taking of job applications, the giving of competitive examinations, and the establishment of hiring standards. In addition, the County Personnel Department has authority to fire, promote, or discipline employees and to set the general labor policies that the management agency is to administer.

6. Working Rules and Regulations Governing County Transit Employees.

During October, 1961, the County and the Transit Authority adopted and distributed "Working Rules and Regulations" for the employees of the transit system, which were alleged to follow as closely as possible, consistent with county employment requirements, the contract terms negotiated by the Union and the companies, including the pay scales there established. These Working Rules provide that the employees of the Transit Authority shall be county employees, entitled to all the rights, privileges, and benefits of the classified service, with certain exceptions not relevant here; that employees may belong to associations or unions that do not assert a right to strike against the County or "to force collective bargaining procedure"; and that employees or their representatives may participate in hearings before the Association prior to periodic revisions of "the rules and regulations relating to the working conditions of employees of the Authority". The rules further provide that whenever practical, promotional positions

will be filled by competitive examinations under the personnel rules for the classified service set out in the Code of Metropolitan Dade County.

7. Agreement for Delivery of Possession of Transit System.

On November 7, 1961, Dade County and Pawley entered into an agreement supplementing the agreement for sale and purchase (May 17, 1961), wherein the County was granted the option, at its discretion, to take possession of the transit system at any time prior to payment of the purchase price, upon certain conditions. Such supplemental agreement expressly provided as follows:

> "2. COUNTY OWNERSHIP. Upon delivery of possession in accordance with the provisions of paragraph 1 of this Agreement, the County shall become the full, absolute and sole owner and operator of said transit system, and W. D. Pawley shall not thereafter have or exercise any financial or operating control over said transit system. The sole rights of W. D. Pawley in respect to said transit system shall consist of the right to receive revenue bonds in payment of the purchase price for said transit system as fixed and determined by the existing agreements between the parties, as modified by this agreement, at the time of closing."

B. Proceedings Below in State Courts.

On November 21, 1961, the Board of County Commissioners of Dade County, Florida, adopted Resolution No. 7120, entitled as follows:

> "Resolution Directing County Attorney To Institute Appropriate Litigation Seeking To Settle By Judicial Determination Questions Of Law And Matters Of Controversy Created By Union's Demand For A Collective Bargaining Agreement In Connection With Dade County's Operation Of Unified Transit System"

The pertinent provisions of the Resolution are as follows:

"WHEREAS, the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, Division 1267, demands that the County recognize such Union as the sole and exclusive bargaining representative or agent for all transit employees, and that the County enter into a collective bargaining agreement with such Union covering wages, hours, working conditions and all other matters of employment; and the County has good reason to believe that, if the County undertakes to take possession and operate said transit systems without complying with the demands made by the Union, the Union will cause a strike, walkout, or work stoppage of the transit employees; and

WHEREAS, the County is informed and believes that it cannot lawfully recognize the Union as the exclusive bargaining agent for the transit employees, or make the wages, hours, and working conditions of County employees the subject matter of a collective bargaining agreement with the Union. The Union contends that the County can lawfully comply with its demands; and

WHEREAS, it is essential in the public interest that the questions of law and matters of controversy raised by the Union's demands be settled in an orderly manner by judicial determination prior to the County taking possession of and operating said transit system in order to alleviate the possibility of a stoppage of the running of busses and the economic loss and damage that such stoppage would impose upon this community,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, that the County Attorney is hereby authorized and directed to institute appropriate litigation designed to obtain a judicial determination of the questions of law and matters of controversy raised by the Union in respect to the rights, duties

and liabilities of the County concerning the recognition of the Union as the bargaining agent for all transit employees and the demand by the Union that the County enter into a collective bargaining agreement."

On November 30, 1961, the County and the Transit Authority filed in the Circuit Court of Dade County a suit against the Union and its representatives alleging that a strike of the transit system drivers was imminent and praying for a declaratory judgment whether the County and the Transit Authority could lawfully grant exclusive recognition to the Union or enter into a collective bargaining agreement with it (J.A. 1-19). The Union and its representatives resisted this action on the ground that the employees' rights were established in the National Labor Relations Act and that state action in this field was, therefore, preempted by federal law (J.A. 102-128). The plaintiffs answered this contention by urging that the County and Transit Authority were excluded from the statutory definition of employer by Section 2 (2) of the National Labor Relations Act.

The Circuit Court held that, in view of the exemption in Section 2 (2) of the National Labor Relations Act, federal law did not preclude the State from determining whether the Union could strike against the County or whether the County could grant exclusive recognition to, or enter into a collective bargaining agreement with, the Union (J.A. 199-220). Under state law, the court held that collective bargaining agreements with the County and strikes against it are prohibited, absent specific legislative authorization. The court declined to find such authorization in the section of the Florida Statutes cited to it by the Union. It noted, however, that the state provision cited recognized federal primacy over labor disputes between private employers and their employees. The court, accordingly, left

to a "federal tribunal" the question whether the private management agency, when it actually assumed its contract functions following county takeover of the transit system, would exercise such controls over the employees as to constitute it "an employer [under the National Labor Relations Act] or, at least, jointly so with the government" and hence subject to the obligations which that Act places on private, as distinguished from governmental employers.

On January 15, 1962, the Chairman of the Transit Authority wrote to the employees of the transit companies, reciting that the Circuit Court's decision had clearly established "that the County Government could not lawfully enter into a collective bargaining agreement, nor * * * recognize any strike directed against the County Government". The letter offered the employees county employment, following takeover of the transit system, "under the same conditions of employment with respect to wages, hours, working rules, and seniority, as you now have" and stated that the employees would retain "accrued vacation, sick leave, and insurance" and would be entitled to "the rights, privileges and benefits of County employees". Enclosed in the letter was an application form for county employment and a notice of employment status. The letter concluded, "if such forms are not returned it will be assumed that you do not wish to work for Dade County * * * and the County will have no alternative but to fill * * * [your] position".

On February 9, 1962, the County took possession of the transit system pursuant to the Agreement for Delivery of Possession which provided that the County might take title to all the shares in the transit companies, together with all assets, property, and equipment, and might begin immediate operation of the system even though the revenue bonds had not yet been validated, sold, and delivered.

The agreement provides further: "It is understood that the County will immediately liquidate said transit companies so that title to the assets owned by such corporations shall become vested in the County". The resident supervisory personnel whom the management agency had agreed to supply for the operation went on the County's payroll on the County's assumption of possession.

On March 2, 1962, the Union filed notice of appeal from the Circuit Court's decision to the Supreme Court of Florida, alleging that the decision involved a question of construction of "a controlling provision of the * * * Federal Constitution" and urging the Court to dismiss the suit instanter because "under the preemption doctrine a state court is not empowered to adjudicate the novel and substantial question of National Act coverage posed on the facts of this case". The County and Transit Authority appealed from the Circuit Court's additional ruling that Pawley retained "substantial financial or operational control" of the transit system following its transfer and that, therefore, the transit employees would not be eligible under the Florida Statutes "to be included in [the] classified civil service."

On June 8, 1962, the Supreme Court of Florida entered a decision in a proceeding in which the Union had participated, validating the transit revenue bonds. *State* v. *Dade County, Florida*, 142 So.2d 79, 84. The court held, inter alia, that "the County has power to purchase and operate a unified county-wide transportation system * * *." 142 So.2d at 86. In disposing of the contention that the County's purchase of all the stock in Pawley's companies violated a state constitutional prohibition against the County's becoming a stockholder in any corporation, the court held that this prohibition extended only to the County's "becoming a stockholder with others * * *." 142

So.2d at 88. In the instant purchase and sale agreement, the court noted that the County takes title to all the common stock "for the purpose of acquiring said companies in their entirety including all of their assets, and that promptly upon the closing of the transaction the companies will be dissolved and the County will th n become the owner of the transportation system and all of its physical properties". 142 So.2d at 88.

Finally, the court held that the provisions of the purchase agreement and the rates to be charged by the transit system are not subject to review by the Florida Railroad and Public Utilities Commission because the legislature did not intend that the Commission should have "jurisdiction over publicly owned and operated transportation systems." 142 So.2d at 89.

On November 1, 1963, the District Court of Appeal of Florida, Third District, rendered its decision on the appeals taken by both parties from the final decree and opinion of the Circuit Court of Dade County. The District Court of Appeal held that the state courts had jurisdiction to entertain thi litigation; that Florida law barred the County fro n bargaining collectively with a labor union and immunized the County against strikes by County employees; that members of the union who accepted employment as County employees were entitled to the benefits of civil service; and that although Pawley has a substantial financial or operating control (within the meaning of Section 839.221, Florida Statutes) as an owner of revenue bonds issued by the County to pay the purchase price for the transit system, he does not have ultimate control over the transit system. *Dade County* v. *Amalgamated Association, etc.*, 157 So.2d 176 (Fla. 1963).

The Union took an appeal to the Supreme Court of Florida from the decision of the District Court of Appeal,

contending federal preemption and violation of the supremacy clause. The Florida Supreme Court dismissed the appeal. 166 So.2d 149.

The petition for writ of certiorari herein seeks a review of these decisions of the Florida Courts.

C. Federal Court Proceedings.

While the foregoing proceedings were pending in the state courts, the Union filed charges of unfair labor practices against the County with the National Labor Relations Board. The initial charges alleged, inter alia, "a plan, agreement and conspiracy" to transfer from Pawley to Dade County "the status and powers of 'employer' of bus employees while Pawley retains beneficial ownership and substantial control of the bus system, intending thereby to divest bus employees and the Union of their federal statutory right to bargain collectively."

On February 13, 1962, the Union filed a second amended charge with the Board alleging that W. D. Pawley had "discriminatorily locked out and discharged all employees of * * * [the transit companies] * * * by transferring to Dade County and Dade County Transit Authority the role of employer with knowledge that they would condition offers of employment upon relinquishment or abandonment of the right to bargain collectively and to strike * * *". The charge further alleged that Dade County and the Transit Authority had "discriminatorily denied said locked out and discharged employees opportunity to accept employment by conditioning job offers to them upon relinquishment or abandonment of the right to bargain collectively and to strike" and that by this conduct "Pawley, Dade County and the Dade County Transit Authority [had] additionally violated Section 8 (a) (1), (3), and (5) of the Act".

On March 2, 1962, the Regional Director of the Board for the Twelfth Region wrote a letter to all parties concerned, stating that it had been decided not to issue a complaint based on appellant's unfair labor practice charges because, following investigation and study, it had been concluded that "in the present posture of the case the County is the employer * * *; that the statutory exemption in Section 2 (2) of the National Labor Relations Act is applicable; and that the sale and purchase arrangements between Pawley and Dade County do not require a different conclusion." The letter added:

> "However, as you know, there is presently pending litigation in the Florida State Court between the parties which also raises questions as to the status of the transit line employees and their right to engage in collective bargaining and to strike over terms and conditions of employment, under state law. The outcome of this litigation may conceivably have an impact on the unfair labor practice charge filed by the Amalgamated. For that reason, and in order to permit a re-examination of the charge in the light of the final outcome of the State Court litigation and to avoid prejudicing the rights of the charging parties under the National Labor Relations Act's 6-month statute of limitations, the charge will not be dismissed at this time."

On June 21, 1962, the General Counsel affirmed this ruling.

On November 7, 1962, the petitioner instituted suit in the United States District Court against the General Counsel, seeking a judgment that Dade County was not exempt from the prohibitions imposed by Section 8 of the National Labor Relations Act. The District Court dismissed the suit. On appeal, the United States Court of Appeal affirmed. See *Division 1267, Amalgamated Association, etc.*, v. *Ordman*, 116 U.S. App. D.C. 7, 320 F.2d 729 (1963).

SUMMARY OF ARGUMENT

The only substantial question in this case is whether Dade County, a political subdivision of the State of Florida, and its employees are arguably subject to the coverage of the Labor Management Relations Act (notwithstanding the express exclusion granted by Section 152(2)(3) of the Act to states or political subdivisions thereof and their employees), by reason of the fact that Dade County purchased a private bus transportation system by means of revenue bonds payable solely from net revenues derived from County operation and guaranteed to all bondholders by a customary revenue bond trust indenture that the revenue facility (transit system) will be operated by the County in a sound, efficient and business-like manner until the revenue bonds are fully paid.

The state courts, federal courts, and the National Labor Relations Board properly concluded that, under the contract documents governing this transaction, the County is the employer and the statutory exemption in Section 2 (2) of the Labor Management Relations Act is applicable, and therefore, state law governs the labor relations between the County and its employees.

This determination is in full accord with Section 2 (2) of the Act and with the court decisions interpreting that provision. The controlling decisions offer no support whatever for petitioner's contention that government "divests" itself of the statutory exemption by entering into a transaction of this particular nature with private interests. In no case in the history of the Act has an unfair labor practice order been issued against a governmental entity, on the basis of petitioner's "divestiture" theory—or, indeed, on any theory at all. On the contrary, the precedents evi-

dence a consistent concern with whether government or private interests control the employer-employee relationship, predicated on the premise that governmental employers, as such, are never subject to regulation by the National Labor Relations Board.

To be sure, if the County had simply purchased some shares in the private companies, it would not thereby invest those companies with its own statutory immunity. The Florida Constitution (Article IX, Section 10) expressly prohibits the state or a political subdivision thereof from becoming a joint owner or stockholder in any company, or lending its credit or other incident of sovereignty to any company, corporation or association. See *State of Florida* v. *Dade County,* 142 So.2d 79, 88. But that is not the situation presented here; for it is the County that possesses the employer controls; it is the County that hold title to all the transit system assets; it is the County that petitioner seeks to reach with its unfair labor practice charges; and it is the County that is specifically exempted under Section 2 (2) of the Act.

The covenants of sound and efficient operation included in the trust agreement do not warrant a different result. Such covenants are common features of revenue bond indentures and are perfectly consistent with the County's possession of the employer controls, ownership of the transit assets, and right to the statutory exemption. Petitioner's further contention that the County's purchase of the transit system was part of an elaborate scheme to lend the County's statutory immunity to Pawley's companies has no support in the record. Clearly, from the County's point of view, the purpose of the transaction was to acquire a transit system. The fact that the parties were aware of the statutory exemption for governmental employers and that they probably regarded it as one of the advantages of county opera-

tion and ownership does not make the realization of these advantages improper. Nor did it transform the purchase and sale of the transit system into a "conspiracy * * * to divest bus employees and the Union of their federal statutory right to bargain collectively," as petitioner alleges.

The employer-employee relationship is the controlling factor in labor relations. It is undisputed in this case that the employees involved are County employees in every sense. They are paid by the County. They may be discharged only in accordance with civil service regulations promulgated by the County. Their wages and working conditions are established by rules and regulations adopted by the County. Neither the bondholders, the former owner, or anyone else has any control whatever over these employees, except the County. They occupy exactly the same status as all other employees of the County government. As government employees, they are inhibited by state law and state policy from bargaining collectively and striking against the government. It is noteworthy that 5 U.S.C. 118 prohibits the employment of federal employees knowingly members of an organization asserting the right to strike. *Section 839.221, Florida Statutes*, contains the same restriction; however, it is provided that where a privately owned utility is "taken over" by the state, a county, or a municipality, and the former owner "maintains a substantial financial or operating control" the employees may become governmental employees even though they knowingly belong to an organization asserting the right to strike against the government. This permits the Union members to accept employment by the government, if it is determined that the condition of "substantial financial or operating control" exists. The state courts simply found that Pawley maintains a "substantial financial or operating control" in the transit system purchased by the County—within the

meaning of the Florida Statute. Thus, the Union members were not deprived of the privilege of becoming employees of the County and maintaining exactly the same status they occupied under private ownership (except the right to strike and bargain collectively). However, the state courts, and the National Labor Relations Board, concluded that the County, as the "employer"—within the meaning of Section 2 (2) of the Labor Management Relations Act—was vested with the ultimate control of the transit system and the employees.

This case presents no unique or unusual situation. Courts of other states have uniformly upheld state statutes prohibiting strikes against governmental agencies where constitutional questions and federal preemption were raised. *City of Detroit* v. *Division 26 of Amalgamated Association, etc.*, 332 Mich. 237, 51 N.W.2d 228, appeal dismissed 344 U.S. 805, 73 S. Ct. 37, 97 L. Ed. 627; *International Longshoremen's Association* v. *Georgia Ports Authority*, 217 Ga. 712, 124 S.E.2d 733, cert. denied 370 U.S. 922 (1962); *South Atlantic and Gulf Coast District of International Longshoremen's Association* v. *Harris County, etc.*, 358 S.W. 2d 658 (Tex.), cert. denied 372 U.S. 975; and *State* v. *Brotherhood of Railway Trainmen*, 37 Cal. 2d 412, 232 P.2d 857, cert. denied 342 U.S. 776. See also *Rhyne, Labor Unions and Municipal Employee Law* (NIMLO, 1946).

The real motivation for this controversy engendered by petitioner is its deep seated opposition to any acquisition of transportation facilities by government. See *State of Florida* v. *Dade County*, 142 So.2d 79, 89. By supplemental petition, the petitioner urges this Court to exercise jurisdiction to put a stop to the widespread trend of government acquiring revenue producing facilities without pledging the general taxing powers.

The merits of the public policy in favor of government acquisition of revenue producing facilities for the common benefit of the public, and of permitting governments to control the organizational rights of their own employees, are, of course, not in issue here, in view of the express exemption in Section 2 (2) of the Labor Management Relations Act. The question is simply whether the state courts, the federal courts, and the National Labor Relations Board correctly construed the contract documents here involved as not making this transaction arguably subject to the provisions of the Labor Management Relations Act.

ARGUMENT

This is not a situation where the General Counsel of the National Labor Relations Board has declined to act. The General Counsel, after full investigation and study of the transaction, affirmatively concluded that:

> ". . . The County is the employer of the employees who are or will be engaged in the operation of the transferred transit lines; that the statutory exemption in Section 2 (2) of the National Labor Relations Act is applicable; and that the sale and purchase arrangements between Pawley and Dade County do not require a different conclusion."

Moreover, the General Counsel recognized the pending litigation in the state court, and deferred to the exercise of jurisdiction by the state court.

The conclusions and actions of the General Counsel were reviewed and upheld by the United States District Court and the United States Court of Appeals. *Division 1267, Amalgamated Association, etc.*, v. *Ordman*, 320 F.2d 729 (1963).

It is recognized that the conclusions of the General Counsel are not conclusive as to the issue of whether Dade County is arguably subject to the coverage of the National Labor Relations Act, but it is respectfully submitted the adjudications made by the General Counsel, the federal courts and the state courts to the effect that the contract documents evidencing this transaction do not justify a conclusion other than the applicability of Section 2 (2) of the Act should have a material bearing on the propriety of this Court to exercise its discretion. At least, it serves to support the correctness of the state decision sought to be reversed.

The National Labor Relations Act does not purport to regulate labor relations between subdivisions of a state and its employees. The states and their employees are by definition expressly excluded from the coverage of the Act. In this case, all the employees utilized in connection with the operation of the transit system are absolutely and completely under the full control of the government. No private interests have anything whatever to do with any of the activities of these employees. They occupy exactly the same status as other County employees. The "substantial financial or operating control" of the bondholders relates solely to the financial operations of the transit system, and not to the activities of the employees. Thus, the principle enunciated in *Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963), is not applicable.

The petitioner's charges that the County engaged in a conspiracy to deprive the transit employees of their rights are disproved by the circumstances set forth in *Hardy* v. *O'Grady*, 159 So.2d 908 (3rd D.C.A. Fla. 1964). The Board of County Commissioners undertook to provide that only members of the petitioner union shall be eligible for employment by the County in connection with the op-

eration of the transit system. The court held that the Union members were entitled to exactly the same rights and privileges as others.

Section 8 (a) of the Act, on which petitioner predicated its unfair labor practice charges in the instant case, prohibits certain actions by "an employer." Section 2 (2) provides:

> "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof * * *".

In the instant case, the County and its Transit Authority possess the relevant controls with respect to the transit employees. They control the hiring, firing, promoting, and disciplining of these employees; they set the wage rates and labor policies. Of the four private interests involved in the transaction, three (the bondholders, the trustees, and the consulting engineers) have only the most incidental contact with the transit system's employees, for their rights and duties under the various contract arrangements relate only to insuring payment of the bond debt from the transit system's revenues. The fourth private interest, the management agency, has a somewhat more substantial contact with the transit drivers, but its relationship still falls far short of that of employer to employees. Thus, the management company will set bus routes, assign drivers, keep attendance records, and establish procedures for regular maintenance and repair of the transit system's equipment, supplying the technical "know-how" for the operation that the County lacks. But, so far as labor relations are concerned, the management company's employees are simply to implement policies established

by the County and the Transit Authority in much the same way that any supervisory employee carries out the policies of his employer. Petitioner relies on the County's covenant in the trust agreement not to pay higher wages than are reasonable and not to employ more men than are necessary, as part of its general undertaking to run the transit system economically and efficiently. This covenant obviously does not vest the trustees and the bondholders with the kind of controls that would constitute them employers under the Act. If the situations were reversed, with the private parties retaining the employer controls, subject to certain general covenants and controls operating in favor of the County, only the private parties, and not the County, would come under the Act's coverage as employers. See *R.F.C.* v. *Merryfield*, 134 F.2d 988, 991-992 (C.A. 1).

Petitioner acknowledges that the County, as the employer here would ordinarily be entitled to governmental immunity under Section 2 (2) of the Act, but contends that it has "divested" itself of this immunity by entering into a "joint venture" with private interests. In support of this contention, petitioner cites a number of cases which, unlike the instant one, do not involve a claim of sovereign privilege or exemption by a governmental entity itself, but rather turn on whether corporations in which government participates as a shareholder are to be regarded as an arm of the state by virtue of the government's stock ownership and to be thereby entitled to the privileges and immunities of governmental entities.

Thus, the denial of the attributes of sovereignty in those cases turns, not so much on the participation of private interests, as it does on the government's apparent waiver of immunity, evidenced by its participation in a separate entity which may be reached without subjecting

government itself or property held in government's name to judicial processes. *Coale* v. *Societe Co-operative Suisse Des Charbons*, 21 F.2d 180, 181 (D.C. N.Y.); *United States* v. *Deutsches Kalisydikat Gesellschaft*, 31 F.2d 199, 202-203 (D.C. N.Y.). See also the *Planters' Bank* case, 22 U.S. 398, where the Court stated, "The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, and not that of the individual corporators." 22 U.S. at 399. Indeed, these same principles are operative even where government owns all the stock in the corporation. See *United States* v. *Strang*, 254 U.S 491, 493; *Panama Railway Co.* v. *Curran*, 256 Fed. 768, 771-772 (C.A. 5).

Obviously none of these precedents authorize the Board in the instant case to infer that the County has waived its express statutory immunity by entering into the trust agreement under which revenue bonds were issued to finance the County's purchase of the transit system. Even if the trust for revenue funds could be analogized to a corporation in which bondholders participate as shareholders with the County, by virtue of their right to receive interest and to enforce the covenants protecting the security of their investment, any waiver inferable from joint participation therein would be applicable only to proceedings against the trust, itself, which is certainly not an "employer" under the Act. Thus, it would be meaningless for the Board to issue an order directing the "trust" (which is simply a depository for the transit system revenues) to cease and desist from the unfair labor practices charged, to reinstate with backpay the transit employees alleged to have been discriminatorily terminated, or to bargain on request with the petitioner union. It is the County that holds title to the transit system assets; it is the County that possesses all the employer con-

trols; it is the County that petitioner seeks to reach by its unfair labor practice charges; and it is the County that is specifically exempted under Section 2 (2) of the Act. No amount of word play can change those facts.

For the same reasons, petitioner's case is not forwarded by the fact that Congress exempted "wholly owned" government corporations from the Act in 1947 and left within statutory coverage government "instrumentalities" and corporations in which government is only a partial shareholder. See also *N.L.R.B.* v. *Bank of America*, 130 F.2d 624, 627 (C.A. 9). The General Counsel's refusal to issue a complaint in the instant case is in no way inconsistent with a recognition that if the County had merely purchased some of the shares in Pawley's companies, those companies, in their exercise of the common law employer controls, would not be exempt under Section 2 (2) of the Act, simply by virtue of the County's partial ownership interest. On the contrary, the General Counsel's approach, unlike petitioner's, makes the statutory exemption turn on employer, rather than financial or operational controls.

Petitioner would apparently divest government of its statutory exemption immediately upon discovering the presence of private interests in the transaction. Thereafter, without regard to whether government or the private interests possessed the employer controls, it would order somebody, the "employing industry", or the "joint venture", perhaps, to remedy the violation found, leaving compliance to anyone with sufficient control to effect it.

A somewhat more precise method of determining statutory coverage has been developed over the years in the interpretation of the governmental exemption. In no case has government itself been ordered to comply with an unfair labor practice order, on the basis of "divestiture,"

or any other theory. On the contrary, the precedents evidence a consistent concern with whether government or private interests control the employer-employee relationship, predicated on the assumption that if these controls are vested in government alone, coverage is to be denied. On the other hand, if a private entity is shown to possess employer controls, either alone or jointly with government, coverage is established as to the private, but not as to the governmental, interests.

For example, in *Fruco Construction Co.* v. *McClelland*, 192 F.2d 241, 244-245 (C.A. 8), the United States entered into a cost-plus-fixed-fee contract with a private company for the construction of a small munitions plant. After operations started, it became obvious that guards were needed at the installation. At the instance of the Constructing Quartermaster, the private company entered into a subcontract with a detective agency for the guards, paying the agency 75 cents an hour for each guard. The next day, the arrangement was terminated by order of the Quartermaster who thereafter employed and supervised the guards. At first, the company paid the wages of the guards under this arrangement, but they were subsequently made civil service employees and taken off the company's payroll. Interpreting the employer exemption in the Fair Labor Standards Act, the court did not adopt the kind of approach urged by petitioner here—that is to say, it did not view the entire operation as an enterprise in which private interests participated, with resultant divestiture of the government's immunity. Instead, after a careful consideration of the various employer indicia, the court found the United States to be the employer of the guards and concluded that the statutory exemption applied to block an employee suit for overtime. See also, *Patton* v. *Roane-Anderson Co.*, 192 F.2d 965, 967 (C.A. 6);

Roane-Anderson, 95 NLRB 501; *Civilian Cafeteria Board,* 106 NLRB 208.

Further doubt is cast upon petitioner's divestiture theory by *Tampa Shipbuilding Co., Inc.,* 62 NLRB 954, where government, itself, was held to be exempted from the Act's coverage, even though, as petitioner acknowledges all ownership and operational controls were in the hands of private interests. In that case, a county sheriff supplied deputized guards to a private shipbuilder under a state statute authorizing the provision of such services to war industries, provided that the industries concerned reimbursed the sheriff for the cost of the guard services supplied. The Board stated (62 NLRB at 957):

> "The Company contends that the guards, as deputy sheriffs, are employees of the sheriff * * * and hence are not within the coverage of the Act. It apparently argues that, since the guards are employees of the sheriff by express provision of the State statute, they cannot simultaneously be employees of the Company. Significantly, however, the Florida Statute does not purport to declare that the guards are no longer to be considered employees of the Company. Indeed, although the statute explicitly makes the deputized guards employees of the sheriff, other provisions of the same statute obviously envisage a continuing degree of control over such guards to be exercised by the company whose premises are being guarded.
>
> "* * * Clearly, just as the control over the labor relations of a given group of employees may be shared by two private individuals, so it may be shared by a governmental agency and a private individual or company, as the [State] statute in the instant case apparently contemplates. The fact that Section 2 (2) of the Act excludes a political subdivision of a State from the definition of 'employer' cannot,

> as the Company inferentially argues, remove from the scope of the Act the private company which shares with the political subdivision control over the labor relations of the workers involved. * * * The single question to be resolved then is not, as contended by the Company, whether the guards became the employees of the sheriff * * * but whether the relationship of the guards to the Company * * * has continued to be that of employees within the meaning of the Act."

After analyzing the various employer controls still remaining with the Company, which were found to constitute it an employer under the Act, the Board concluded (*62 N.L.R.B. at 961*):

> "As already indicated the sheriff is excluded from the definition of the term 'employer' as defined in Section 2 (2) of the Act since he is a governmental agent. In making the finding herein * * *, the Board intends neither to encroach upon the prerogatives of the sheriff nor to redefine the relationship which exists between the sheriff and the guards. In the event that the Union wins the election ordered herein, the certification of it as the collective bargaining representative will be limited to those aspects of the labor relations of the guards which, the evidence indicates, are within the control of the Company."

A federal district court, which took an approach somewhat similar to the "joint venture" theory advanced by petitioner here was subsequently reversed by the First Circuit in *R.F.C.* v. *Merryfield*, 134 F.2d 988, 991-992. In that case, a shoe corporation borrowed $112,000 from the Reconstruction Finance Corporation and gave as security a mortgage on its real estate. The shoe corporation ceased manufacturing but continued to lease space in its building to other tenants, assigning all rents to R.F.C. A suspended credit account of the shoe corporation was set up in a federal reserve bank, under an agreement that all maintenance

expenses of the plant were to be paid from it and that the balance was to be used in payment of the principal and interest on the loan from R.F.C. The shoe corporation retained employer controls over the servicemen for the building.

The lower court held that R.F.C. was not entitled to the governmental exemption in Section 3 (d) of the Fair Labor Standards Act (which does not specifically exempt wholly owned government corporations), and concluded that R.F.C. was, therefore, subject to suit for overtime, along with the shoe corporation, if it was otherwise covered by the statute. On this issue, the lower court found that, although the employees worked for the shoe corporation, R.F.C. was so closely connected with the corporation through its financial aid, that it, thereby, became subject to the statute's provisions.

The First Circuit held, on the contrary, that only the shoe corporation was covered because it held the relevant employer controls. Reserving the question whether wholly government-owned corporations are entitled to the employer exemption in the FLSA, the court held that R.F.C. was, in any event, not covered by that statute, stating (134 F.2d at 991-992):

> "As we pointed out in the statement of facts, the District Court did not find specifically that R.F.C. was for the period in question an employer of appellees. The judgment against R.F.C. was based upon its financial interest in the affairs of the Shoe Corporation. Unless we determine that such an interest creates an employer-employee relationship or that the applicable sections of the Act bring R.F.C. within its purview as an employer we must reverse the District Court.
>
> * * *
>
> In the case before us the facts show that R.F.C. in order to protect its investment took an assignment of

> the rents from the Shoe Corporation and as part of that assignment an agreement was entered into by the parties whereby the maintenance expenses were to be deducted from the rents. This included the payment of wages to these appellees. As we have said, R.F.C. did not become an employer merely because it drew checks upon the suspended credit account to pay these employees. It was only the net rent which it received from the property which was deducted from the obligation of the Shoe Corporation. At most this was a bookkeeping transaction agreed upon to protect R.F.C. and to permit it to maintain close vigilance over the affairs of the Shoe Corporation. If the property produced no income R.F.C. would not have expended any further sums for the payment of the wages of these employees. The original loan of $112,000 is actually the only investment which R.F.C. made. All other transactions entered into by the parties were only to insure R.F.C. some return upon its investment."

See *Great Southern Chemical Corp.*, 96 NLRB 1013. See also *Cosmopolitan Shipping Co., Inc.*, 2 NLRB 759, 761-762, where the Board noted the existence of virtually all employer controls in the private entity and discounted the financial controls of the government. Similarly, the financial and operational limits placed on the County's operation of the transit system in the instant case serve as security for the bondholders' investment without interfering with the County's role as employer of the transit system's drivers.

Political subdivisions frequently acquire privately owned utilities, as the County did here, by the issuance of bonds, which create no lien on the credit and taxing power of the state, but are payable solely from the revenues to be derived through operation of the utilities acquired. *Farmington Township* v. *Warrenville State Bank*, 185 F.2d 260, 261 (C.A. 6); *People* v. *Chicago Transit Authority*, 392

Ill. 77, 64 N.E.2d 4, 8; *City of El Campo* v. *South Texas National Bank,* (Texas Civ. App.) 200 S.W.2d 252; *Interstate Power Co.* v. *Forest City,* 225 Iowa 490, 281 S.W. 207, 213; *Cawood* v. *Coleman,* 294 Ky. 858, 172 S.W.2d 548, 550; *Williams* v. *City of Barbourville,* (Ky. App.) 246 S.W.2d 591, 593; *15 McQuillin, Municipal Corporations* (Callagan & Co., 1950) §§ 43.11, 43.34, 43.131; *Rhyne,* Municipal Law (NIMLO, 1957) §§ 14-2, 14-7, 14-8, 14-9, 14-17, 23-7; *Bird,* Revenue Bonds (Haynes Foundation, 1941) p. 20; Fordham, Revenue Bond Sanctions, 42 Col. L. Rev. 395, 423-425; *Nehemkis,* The Public Authority, 47 Yale L.J. 14, 16-18.

Since the bondholders' investment is thus dependent solely on the continued earning of sufficient revenues, guarantees of economical and efficient operation are normally part of such transactions. *Rhyne,* Municipal Law (NIMLO, 1957) p. 337; Fordham, Revenue Bond Sanctions, 42 Col. L. Rev. 395, 423-425; *Nehemkis,* The Public Authority, 47 Yale L.J. 14, 16-18. See, *e.g., Farmington Township* v. *Warrenville State Bank,* 185 F.2d 260, 261 (C.A. 6). One commentator, *Bird,* Revenue Bonds (Haynes Foundation, 1941), pp. 20, 33-34, has stressed the importance of such covenants in the following terms:

> "It is * * * very important that the borrower be given the power to do all the things necessary for the success of the enterprise, including the making of covenants with bondholders respecting such matters as the use and disposition of funds, the maintenance of adequate reserves, proper upkeep and repairs, the carrying of insurance, the keeping and auditing of accounts, and the action which may be taken in the event of default.
>
> Such covenants, incorporated in the bond ordinance or resolution and made a part of the bond contract, can be useful in saving money for the project, protecting it from political interference, and helping to

insure its success. One important objective, of course, is to sell bonds at the lowest possible interest cost. In order to do this it is always necessary to keep in view the fact that the lender is not receiving a pledge of the full taxing power of the community, but is being offered solely the security of a business interprise. * * * The usual way of handling these safety provisions is to incorporate them in the bond resolution, but it may be done through a trust indenture. The latter involves the appointment of a trustee for the bondholders, whose responsibility is to see that their rights are safeguarded.

* * *

[The investor,] since his security lies in the financial success of the undertaking, * * * wants assurance that it will receive businesslike management. * * * [He] is * * * concerned that the bond funds be properly expended, that construction be carefully inspected, that the plant and equipment be well kept up * * *, that the rate structure be designed to make and keep the project self-supporting, and that adequate financial safeguards be set up to prevent revenues from being ruthlessly diverted and to assure the maintenance of adequate working capital and reserves.

Since these items are among the fundamentals of good management, the bondholders and the local citizens have a mutual interest in their realization. * * * All too frequently * * * the best of managers finds himself handicapped by loosely drawn provisions of the municipal charter, schemes of politicians to rob the enterprise, and even the machinations of persons who would like to see it discredited.

The bonds can be given more attraction for investment, and at the same time high standards of management given more protection, by entering into contractual pledges with the bondholders to maintain these standards."

Thus, the covenants in the trust agreement entered into by the County in the instant case are perfectly consistent with its ownership of the transit assets, its possession of the employer controls, and its right to the statutory exemption. Petitioner relies heavily on the functions of the consulting engineers under the trust agreement to defeat the County's statutory exemption. These functions, however, serve the interests of the County and its citizens as well as those of the bondholders.

See *Bird*, Revenue Bonds (Haynes Foundation, 1941), p. 30:

> "Any new project or extensive improvement of an old one calls for the services of a consulting engineer or engineers. No matter how experienced a municipality's engineering staff may be, it is not necessarily specialized in all the phases of planning a new project and its financing. In any event, the public officials, the prospective consumers, and the chief engineer himself need the protection which comes from the independent checking and advice of a competent outside consultant.
>
> A consulting engineer is indispensable for still another reason. It is largely through his independent work and reports that a favorable market can be found for the bonds. * * * Thus, the municipality has something to gain and nothing to lose by selecting a consultant with an established reputation for sound engineering ability and independence of opinion."

Although petitioner refers to the consulting engineers as Pawley's "agent-trustees", it offers nothing to justify this reflection on their independence and impartiality—a reflection of a rather serious nature since the County's purchase of Pawley's companies was predicted on a supposedly objective report of the consulting engineers, made at the request of the County's Transit Authority. More-

over, the trust agreement itself recognizes the independence of the consulting engineers and the very real possibility that their recommendations will not always meet with the approval of the bondholders.

Nor is there merit to petitioner's contention that Pawley may "recapture title and possession whenever the County fails to perform any of its obligations under the [trust] agreement". On February 9, 1962, Pawley relinquished full ownership of the transit system and its assets to the County. He was, thereafter, remitted solely to the rights of a bondholder. The bonds issued entitled Pawley, together with the other bondholders, to a first lien on the transit revenues for payment of the bond principal plus interest. The bonds are not, however, to be "construed * * * as conveying or mortgaging the Transit System or any part thereof". Thus, like most holders of revenue bonds, the bondholders here have only a pledge of revenues to secure their investment and lack the right to force foreclosure of the transit system upon default. Moreover, Pawley could, in any event, have no right to "repossession" of the transit system, for this would authorize him to pull the security out from under the other bondholders' investment, in complete derogation of the obligations established in the trust agreement.

Equally untenable, is the suggestion that the County's purchase of the transit system was part of an elaborate scheme to lend the County's statutory immunity to Pawley's companies. Clearly, from the County's point of view, the purpose of the transaction was to acquire a transit system. To be sure, the parties were aware of the exemption for governmental employers under Section 2 (2) of the Act; and probably, they regarded it as an advantage—as they did the other attributes of County operation and ownership. Thus, the consulting engineers, in their

reports to the County on the projected acquisition of the transit companies, commented on the rosy prospects raised by the elimination of: (1) franchise payments; (2) unemployment compensation; (3) certain taxes on real and personal property, diesel fuel and gasoline, and capital stock; (4) mileage payments; and (5) bus inspection costs. The reports also speak with favor of the freedom from state regulation, and the advantages of unified operation under county ownership. But recognition of these advantages, which is always present, does not make their realization improper. See *State* v. *Dade County*, discussed *supra*; Fordham, Revenue Bond Sanctions, 42 Col. L. Rev. 395, 431. Nor did awareness of the exemption in Section 2 (2) of the Act transform the purchase and sale of the transit system into a "conspiracy * * * to divest bus employees and the Union of their federal statutory right to bargain collectively".

In its effort to defeat the statutory exemption here, petitioner also relies on cases involving government seizure of private industry during the course of labor disputes. The difference between government's transient and disinterested control of industry in those cases and the lasting and significant interest of the County in the operation of the transit system here is obvious on its face (Cf. *N.L.R.B.* v. *Bachelder*, 120 F.2d 574 (C.A. 7), cert. denied 314 U.S. 647, where the receiver of a corporation was found subject to the Act). Moreover, in *United States* v. *U. M. W.*, 330 U.S. 258, even though government control of the mines was only temporary, and even though the Regulations for Operation of the Mines provided that none of the earnings or liabilities resulting from operation of the mines, while under seizure, were chargeable or payable to the Government, that the companies continued to be liable to suit and for taxes, and that the regulations should

not be construed as recognizing the companies' employees as employees of the Federal Government, nonetheless the Court found an implied exemption in the Norris-LaGuardia Act permitting the courts to restrain strikes by these "government" employees, 330 U.S. at 285, 288. Under these circumstances, petitioner can derive scant comfort from the statement in the concurring opinion of Justices Black and Douglas, that absent "ultimate control" of the government, evidenced by a right to remove the private managers who were still running the operation, no exemption would be inferred in the prohibitions of Norris-LaGuardia. 330 U.S. at 329.

Finally, petitioner urges that as policy considerations militate toward a broad construction of "state action" under the Fourteenth Amendment, so, conversely, the policy in favor of collective bargaining militates toward a narrow reading of the state's exemption under Section 2(2) of the Act. This contention ignores the countervailing policy considerations supporting the exemption of government as employer—policy considerations that led to congressional enactment of Section 2 (2) of the Act even though the effect of this enactment was to deny collective bargaining rights to a substantial group of employees. Arguments in favor of repudiating this policy can properly be addressed only to Congress. See *Creekmore* v. *Public Belt R.R. Comm. of New Orleans*, 134 F.2d 567, 577-578 (C.A. 5).

The labor relations of employees working under the direct supervision and full control of a county government in connection with the operation of a bus transportation system, which the County purchased by means of revenue bonds payable solely from net revenues derived from the County's operation, payment of which revenue bonds are secured by a trust indenture between the County and corporate bank trustees guaranteeing to all revenue bondhold-

ers that the system will be efficiently operated by the County, are not subject to coverage of the federal labor statutes, but are governed by state law.

A proper interpretation of the contract documents here involved clearly refutes any notion that this transaction presents any unique or important question of federal law. The state courts, federal courts, and the General Counsel correctly recognized and applied the controlling precedents.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been mailed by airmail, postage prepaid, this 10th day of December, 1964, to the following:

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 388

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, PETITIONER

v.

DADE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, AND THE METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, A GOVERNMENTAL ENTITY OF DADE COUNTY, FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT

This memorandum is filed pursuant to the request of the Court for the government's views on the issues raised by the Union's petition for certiorari. The petition seeks review of a judgment of the State courts of Florida declaring that Dade County and its Transit Authority are not permitted, under State law, to recognize and bargain with the Union as the collec-

tive bargaining representative of the Transit Authority's employees, and enjoining the Union from engaging in strike action to compel such recognition or bargaining (Pet. 5–6; Pet. App. A3–A4, A12–A13, A14, A47–A48). The basic question presented is whether Dade County and its Transit Authority in their operation of a transit system in Miami, Florida, are removed from the coverage of the National Labor Relations Act by the governmental exemption in Section 2(2) of the Act. That section provides:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof * * *.

A. THE UNDERLYING FACTS

In the summer of 1960, the Board of County Commissioners for Dade County, Florida, enacted an ordinance creating the Metropolitan Dade County Transit Authority, composed of five members, appointed by the County Commissioners (R. 1389–1390; J.A. 33).[1] The Transit Authority is empowered, under the ordinance, to perform functions with respect to "the acquisition, establishment, financing, operation, maintenance, control and expansion of a mass transit sys-

[1] "R." refers to the portions of the record in the court below filed with the petition. "J.A." refers to the joint appendix to the briefs in *Division 1267* v. *Ordman* (*infra*, p. 11), which is an item listed in the index to the transcript of record. However, since a copy of the joint appendix apparently has not been transmitted, we are filing a copy thereof with this memorandum.

tem * * *, under the direct supervision and control of the Board of County Commissioners" (R. 1390; J.A. 35). Approximately a year after enactment of the ordinance, the County, on the recommendation of the Transit Authority, entered into an agreement for the purchase of four private transit companies from W. D. Pawley (R. 1401, 1405; J.A. 62).

Under the purchase arrangements, Pawley transferred his shares in the companies to the County at an agreed valuation of $7,705,274, minus the liabilities outstanding at the time of closing (R. 1405–1406; J.A. 63). The County did not pledge its faith and credit, or taxing power for payment of this price (J.A. 64, 140). Instead, the County issued Special Revenue Transit bonds in the aggregate principal amount of $9,000,000 (R. 1407; J.A. 64). Out of this total issue, the County paid Pawley the bulk of the purchase price for his transit companies, in bonds of the appropriate principal amount (R. 1406–1407; J.A. 63–64).[2] The balance of the bonds, over and above the purchase price, were sold for cash at face value to customers supplied by Pawley, and the proceeds of these sales were put into the operation of the transit system (R. 1407, 1409; J.A. 64, 65, 74). The bonds pay five percent interest annually and mature serially within the 15 years between 1962 and 1977 (R. 101–102; J.A. 79). Upon specific authorization by County ordinance, however, the bond debt

[2] The only part of the purchase price that Pawley did not receive in bonds was $300,000, which the County paid in cash from the proceeds of the sale of certain transit properties not needed for the County's operations (R. 1426; J.A. 74).

may be refunded up to 40 years (J.A. 88–89). Bond principal and interest payments are to be met exclusively from the revenues of the transit system, which, under the terms of a Trust Agreement (discussed below), are to be held in trust pending the retirement of all bonds (R. 1407, 1564; J.A. 64–65, 74a, 138–139). Although the bonds constitute a first lien on the transit revenues (J.A. 74b, 112–113, 121), they are not to be "construed * * * as conveying or mortgaging the Transit System or any part thereof" (R. 1578; J.A. 140, 64–65). Thus, when Pawley, on February 9, 1962, relinquished full ownership of the transit companies and their assets to the County, he was remitted solely to the rights of a bondholder (R. 1460; J.A. 240–241).

Pawley and the other bondholders have extensive protection for their investment under the Trust Agreement for the transit revenues (R. 1564–1568; J.A. 71–141). The Bankers Trust Company and the Miami Beach First National Bank are named as trustee and co-trustee under this Agreement (R. 1564; J.A. 72). Their function is to act as custodians of the revenues, channeling sums into the various accounting funds,[3] in accordance with the requirements of the Trust Agreement and the current county budget, and paying moneys out of these funds upon requisitions signed by the County Finance Director

[3] These funds include an operating fund, a damage reserve account, a construction fund, an equipment reserve fund, an improvement fund, a special reserve fund, a revenue bond interest and sinking fund, and a renewal and replacement fund (J.A. 83, 105).

and the transit superintendent (R. 1565–1566; J.A. 92, 93–94, 102–103, 104–105, 109, 111, 112).

In addition, the County is obligated by the Trust Agreement to employ a designated "management agency" (National City Management Company) and a designated firm of "consulting engineers" (Coverdale & Colpitts), for the transit operation (J.A. 116–117).[4] The primary function of the management agency is to provide the professional and supervisory personnel who direct "day-to-day" transit operations (R. 1545–1547; J.A. 177–178). It is authorized, for example, to prepare a proposed annual operating budget, subject to review by the Transit Authority and the Board of County Commissioners; to recommend changes in routes, schedules, and fares; to establish equipment maintenance and repair procedures; to assign transit drivers to their runs; to keep attendance schedules; and generally to implement the labor policies established by the County Personnel Department (R. 1437, 1545–1547; J.A. 177–181, 189–191).

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[4] The written approval of the trustee is needed before the County is authorized to employ anyone other than the companies designated, as management agency or consulting engineers (J.A. 116–117). The trustees themselves are removable by a vote of the holders of not less than a majority of the outstanding bonds or for breach of duty, by any court of competent jurisdiction upon the application of the Board of County Commissioners or the holders of not less than five percent of the outstanding bonds (R. 1577–1578; J.A. 132). New trustees may be named by the Board of County Commissioners or by the holders of a majority of the bonds with the latters' choice taking precedence in the event of a disagreement (J.A. 132–134).

The consulting engineers are concerned with the general financial and operational policies of the Transit System (J.A. 95, 96, 97, 114, 117–118, 121–122). For example, the County covenants in the Trust Agreement to begin operations charging the same transit rates that were in effect under private operation, or "such other rates" as are approved by the consulting engineers (R. 1567; J.A. 94–95).[5] Thereafter, the County is obligated not to reduce rates without the consulting engineers' assent (R. 1569–1570; J.A. 96, 97). Although the County may refuse to institute rate increases recommended by the consulting engineers or may institute increases that are not recommended, it is encouraged to follow the recommendations of the consulting engineers by a provision in the Trust Agreement that excuses any default in bond payments provided these recommendations have been followed (R. 1571; J.A. 97–98).

Finally, the Trust Agreement contains certain covenants of sound operation. The County agrees that "all compensation, salaries, fees and wages paid by the Transit Authority * * * will be reasonable, that no more persons will be employed * * * than are necessary for the efficient and economical operation of the Transit System, that it will maintain and operate the Transit System in an efficient and eco-

[5] The approval of the consulting engineers is also needed for any change in the transit routes (J.A. 117), or any alienation of the transit system's assets (J.A. 121–122). Similarly, the Transit Authority must secure the approval of the consulting engineers for a transit system insurance program and for the plans and specifications of a central transit system garage (J.A. 117–118, 114).

nomical manner * * * and that, from the Revenues thereof, it will at all times maintain the same in good repair and in sound operating condition * * *" (J.A. 115–116). If the County defaults in the "due and punctual performance" of any of these covenants, the trustee may, and upon written request of the holders of not less than 20 percent of the outstanding bonds shall, declare the principal on all bonds to be immediately due and payable (J.A. 126). Further, the trustee may, and upon the written request of the holders of not less than 10 percent of the outstanding bonds shall, proceed to protect and enforce the rights of the bondholders by such "suits, actions or special proceedings in equity or at law, either for the specific performance of any covenant or agreement contained * * * [in the Trust Agreement] or in aid or execution of any proper legal or equitable remedy, as the Trustee, being duly advised by counsel, shall deem most effectual to protect and enforce such rights" (J.A. 127).

The County has ultimate control of the Transit System's labor relations. Thus, the County Personnel Department handles all matters connected with the hiring of the transit system's employees, including the taking of job applications, the giving of competitive examinations, and the establishment of hiring standards (R. 1545–1547; J.A. 189–191). The Personnel Department also has authority to fire, promote, and discipline employees (J.A. 178–181, 190–191). In October 1961, the County and the Transit Authority distributed Working Rules and Regulations that were

patterned on the contract terms, including pay scales, previously negotiated between the Union and the private transit companies, prior to the County's take-over of the system (J.A. 177, 188–189, 269–270). These rules provide that the employees of the Transit Authority shall be county employees, generally integrated into the classified civil service; that, as county employees, they may belong to unions that do not assert a right to strike against the County or "to force collective bargaining procedure"; and that the employees, or their representatives, may participate in the public hearings that are to be held prior to periodic revisions of "the rules and regulations relating to the working conditions of employees of the Authority" (J.A. 267–268). The rules further provide that, whenever practical, promotional positions will be filled by competitive examinations under the personnel rules for the classified civil service set out in the Code of Metropolitan Dade County (J.A. 270–271, 266).

B. THE JUDICIAL AND ADMINISTRATIVE PROCEEDINGS

On November 30, 1961, prior to the actual transfer of Pawley's assets and the commencement of operations by the County, the County and the Transit Authority instituted the present suit in the Circuit Court of Dade County (R. 12; J.A. 149, 163). The complaint stated that the Union had demanded that the County and the Transit Authority recognize it as the exclusive bargaining representative of all Transit Authority employees; that they assume the obligations of the

employer under the existing labor agreements between the Union and the private transit companies; and that they enter into negotiations looking toward the execution of a new collective bargaining agreement with the Union (Pet. App. A5; R. 19–20; J.A. 156). The plaintiffs asked the court to enjoin a strike threatened in support of these demands and prayed for a judgment declaring that State law bars Dade County and the Transit Authority from recognizing the Union, or bargaining or entering into an agreement with it, as the collective bargaining representative of the transit employees (Pet. App. A5–A6, A9–A10). The Union moved to dismiss the suit on the ground, *inter alia,* that the rights of the transit employees were protected by the National Labor Relations Act, and that the State court therefore lacked jurisdiction of the subject matter (Pet. App. A7; R. 163; J.A. 28).

The county court rejected the Union's contention. It held that, although the purchase agreement left Pawley with substantial financial or operational control of the transit system, this was not sufficient to divest the County of the governmental immunity provided by Section 2(2) of the National Labor Relations Act. The court further ruled that, under State law, the County and the Transit Authority were not obligated to bargain with the Union on behalf of the transit employees and the Union did not have the right to strike for that purpose. It issued a declaratory judgment to that effect, and an injunction restraining the Union from striking to obtain recognition

or a contract from the County (Pet. App. A19–A53). On November 1, 1963, this decision was affirmed on appeal by the Florida District Court of Appeals (Pet. App. A2–A18).[6]

While the State court proceeding was pending, the Union filed with the Board unfair labor practice charges against W. D. Pawley, Dade County, and the Transit Authority. These charges alleged that the object of the transfer agreement was to enable Pawley to evade the statutory obligation to bargain with the Union and to deprive the employees of their right to strike; that, pursuant to this agreement, the charged parties had refused to bargain with the Union, and had made employment in the transit system conditional on relinquishment of the right to strike; and that the charged parties had thereby violated Sections 8(a) (5), (3) and (1) of the National Labor Relations Act (R. 173–176, 306–307; J.A. 9–18).

On March 2, 1962, the Regional Director of the Board notified all parties by letter that he had decided not to issue a complaint on the Union's charges because "in the present posture of the case the County is the employer of the employees who are or will be engaged in the operation of the transferred transit lines," and the statutory exemption in Section 2(2)

[6] The lower court had held that the transit employees, although County employees, were not eligible under State law to be included in the classified civil service (Pet. App. A20). The appellate court reversed this ruling, remanding the case for a determination of the rights of the employees who accepted employment with the County to classified civil service status and other benefits under State law (Pet. App. A15–A16).

of the Act was therefore applicable. The letter added, however, that the charges would not be dismissed at that time because the outcome of the pending State litigation might "conceivably have an impact" on the issues raised by the charges, and dismissal prior to completion of the State proceeding might therefore prejudice the rights of the charging parties under the limitations period imposed by Section 10(b) (Pet. App. A7–A8; R. 292–293).[7] On June 21, 1962, the General Counsel of the Board affirmed this ruling (J.A. 23–24).

On November 7, 1962, the Union filed suit in the United States District Court for the District of Columbia against the General Counsel, seeking a judgment declaring that the arrangements for purchase of the transit system by Dade County did not remove that system from the coverage of the National Labor Relations Act. The district court dismissed the complaint for want of jurisdiction over the action (Pet. 19). On appeal by the Union, the Court of Appeals for the District of Columbia Circuit affirmed. It held that the complaint failed to state a claim warranting relief because "[t]he General Counsel's decision to defer action on the Union's charge was within [his] * * * jurisdiction [under Section 3(d) of the Act]." *Division 1267* v. *Ordman,* 320 F. 2d 729, 730.

[7] Section 10(b) of the National Labor Relations Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *."

DISCUSSION

It is, of course, clear that the provision of the National Labor Relations Act exempting governmental employers from coverage is fully applicable to an enterprise which was once in private hands but has been transferred to public control. Indeed, Congress has only recently recognized that consequence when it enacted the Urban Mass Transportation Act of 1964 78 Stat. 302, providing, *inter alia*, for grants and loans "to assist State and local public bodies and agencies thereof in financing the acquisition * * * of facilities and equipment for use * * * in mass transportation service in urban areas * * *" (Sec. 3(a)). See 109 Cong. Rec. 5672–5674.[8] The only question here is whether there has been a sufficient transfer of the transit systems involved to Dade County so as to make it the employer.

The Board's view is that under settled principles the question should be answered affirmatively.

1. Dade County has made a *bona fide* purchase of the transit lines formerly owned by W. D. Pawley. Although, instead of paying cash, the County issued bonds that are redeemable over a 15-year period out of the revenues of the transit system, the transfer is

[8] In order to cushion this result, the new law provides that it "shall be a condition of any assistance under this Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance," including "(1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights * * *" (Sec. 10(c)).

complete. There is no evidence that the transaction was arranged to evade the requirements of the National Labor Relations Act in an invidious sense. The record indicates only that the parties were aware of the exemption provided governmental employers under Section 2(2) of the Act and regarded the resulting freedom from strikes and collective bargaining as among the advantages of State ownership and operation of the transit system (J.A. 55–57). In short, we are not confronted with the question of the effect of a sham transaction in pursuance of a collusive plot to defeat National Labor Relations Act coverage.

2. Nor is this a case where government has shared employer controls with a private party. In the Board's judgment, the controls reserved by Pawley, though substantial, do not have a sufficiently direct bearing on employment conditions to make Pawley a co-employer of the transit employees.* There is no evidence that Pawley can directly countermand the labor policy fixed by the County Personnel Department, or otherwise directly regulate the working conditions of the transit employees, who are paid by the County. If Pawley believes that the County is paying too much of the transit revenues out in wages, he could, through his control over the trustees, presumably induce them to bring a suit against the County for breach of the trust covenants; but, in order to succeed, he would have to satisfy the court that the

* Whether one is an employer of particular employees for purposes of the Act is ordinarily determined by whether he has power directly to control their employment conditions. See *infra*, pp. 15–17.

wages were not "reasonable" (J.A. 115). Moreover, it does not appear that Pawley has any control of the employment relation through the management agency or the consulting engineers. First, these firms are not themselves vested with employer controls under the Trust Agreement.[10] Second, although Pawley approved the firms selected for these positions, they are independent companies which have other clients. There is no reason to believe that they would be subservient to Pawley's wishes. And, if the County is satisfied with their services, no provision is made in the Trust Agreement for their displacement by the bondholders; the trustee's power to approve other firms to be employed as management agency or consulting engineers comes into play only if the County desires to make a change.

3. The Union does not seriously contend that the County or the Transit Authority shares the employer controls with Pawley or any private entity. Rather, the Union's basic position is that the governmental immunity conferred by Section 2(2) of the Act is lost whenever a State agency enters into a joint venture with private interests, and that the County has done so here by vesting private parties with sub-

[10] Of the private interests involved, the management agency has the closest contact with the transit employees. It sets bus routes, assigns drivers, keeps attendance records, and establishes procedures for the regular maintenance and repair of the equipment. But, so far as labor relations are concerned, the management company's employees simply implement policies established by the County and the Transit Authority in much the same way that any supervisory employee carries out the policies of his employer.

stantial powers (albeit not power over employment conditions and labor relations) in respect to the operation of the transit system. Accordingly, the issue comes down to whether a governmental agency loses the immunity conferred by Section 2(2) of the Act whenever it shares control with private interests, or only when it gives up control over employment conditions and labor relations to a private party. The Board is of the view that Section 2(2) immunity is lost only in the latter case, and that, since there was no sharing of employer controls with private interests here, the State courts correctly concluded that the County-operated transit system was removed from the coverage of the National Labor Relations Act.

Section 2(2) provides that the term employer shall not include "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." This exemption appeared in the original Wagner Act, except for the phrase "or any wholly owned Government corporation, or any Federal Reserve Bank," which was added in 1947. The legislative history of the provision is sparse, but it indicates that Congress' purpose was to avoid intrusion upon relations between the federal, State and municipal governments and their employees, who traditionally were denied the right to strike against the government.[11] Con-

[11] See Leg. Hist. of the National Labor Relations Act, 1935 (G.P.O., 1949) 1117, 2653; Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948) 1535.

The addition in 1947 was designed to make clear that the exemption extended to such governmental entities as TVA or

sistent with this objective, the immunity should apply only where the government can directly control the employment conditions of the employees involved; *i.e.*, where the government, under the tests for determining employer status under the Act,[12] would be regarded as the employer or a co-employer of the employees. For only where the government was able to exercise such control over employment conditions would the Act's requirements be likely to impinge on contrary governmental policies respecting collective bargaining and strike activity by employees.

The Board has applied the governmental exemption in Section 2(2) in accordance with this view. Its precedents in this area may be divided into two categories. In the first category are cases involving agreements by government with private independent contractors for the performance of services or the supplying of goods. There, the Board has inquired who has the relevant employer controls. If government alone possesses them, the Board has held that the statutory exemption at-

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RFC, but did not include an essentially private corporation merely because the United States happened to own some stock therein. See Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948) 303, 536, 1605–1606; and *National Labor Relations Board* v. *Bank of America, etc.*, 130 F. 2d 624, 627, n. 4 (C.A. 9), certiorari denied, 318 U.S. 791, decided prior to enactment of the amendment.

[12] See *National Labor Relations Board* v. *Lund*, 103 F. 2d 815, 819 (C.A. 8); *National Labor Relations Board* v. *Condensor Corp.*, 128 F. 2d 67, 71–72 (C.A. 3); *National Labor Relations Board* v. *Concrete Haulers, Inc.*, 212 F. 2d 477, 479 (C.A. 5); *Public Service Corporation of New Jersey*, 72 NLRB 224, 225–226.

taches to deprive it of jurisdiction.[13] If the independent contractor has the employer controls, the Board has ruled that he comes within the coverage of the Act, even though government holds title to all property, the contract is on a cost-plus-fixed fee basis, and cost items (including wages) are subject to governmental review and approval.[14] And, where the employer controls are shared by government and a private entity, the Board has concluded that the Act's coverage is limited "to those aspects of the labor relations" within the control of the private entity. *Tampa Shipbuilding Co., Inc.*, 62 NLRB 954, 961.[15]

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[13] *Roane-Anderson Co.*, 95 NLRB 1501, 1503. See, also *Fruco Construction Co.* v. *McClelland*, 192 F. 2d 241, 244–245 (C.A. 8); *Patton* v. *Roane-Anderson Co.*, 192 F. 2d 965, 967–968 (C.A. 6).

[14] *Thiokol Chemical Corp.*, 113 NLRB 547, 548; *Carbide and Carbon Chemical Corp.*, 73 NLRB 134, 135–136; *Garner Aviation Service Corp.*, 101 NLRB 517, 518; *American Smelting and Refining Co.*, 92 NLRB 1451, 1452; *Cosmopolitan Shipping Co.*, 2 NLRB 759, 761–762. See, also, *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457 (C.A. 1); *Geronimo Service Co.*, 129 NLRB 366, 368; *War Hemp Industries, Inc.*, 57 NLRB 1709, 1710, n. 3; *Brown Shipbuilding Co.*, 57 NLRB 326, 328; *Copolymer Corp.*, 52 NLRB 578, 579.

[15] See *National Labor Relations Board* v. *Atkins & Co.*, 331 U.S. 398, 412–413, 414–415: "We cannot say that the Board was without warrant in law or in fact in concluding that respondent retained 'a sufficient residual measure of control over the terms and conditions of employment of the guards' so that they might fairly be described as employees of respondent. The most important incidents of the employer-employees relationship * * * remained matters to be determined by respondent rather than by the Army. * * *

"Here we have the Board's considered * * * judgment that militarized plant guards may safely be permitted to join unions and bargain collectively and that their military duties

In the second category of cases, someone who controls the employment relationship contends that it is an arm or instrumentality of government and, as such, is entitled to the exemption. The Board has sustained this contention where the entity claiming the statutory exemption has been created directly by the State, or is administered by State appointed or publicly elected individuals.[16] On the other hand, where the State has merely lent a label to the entity or has

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and obligations do not suffer thereby * * *. [Consistent with this judgment, the] regulations and directives [of the War Department] have clearly acknowledged the feasibility of recognizing collective bargaining rights of these guards during wartime, provided only that no encroachment is made upon military necessities." See, also, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 425–426; *Montgomery Steel Products Corp.*, 94 NLRB 225, 226, n. 2.

[16] *Mobile Steamship Association*, 8 NLRB 1297, 1305, 1308 (State Docks Commission held division of the State of Alabama); *Oxnard Harbor District*, 34 NLRB 1285, 1290 (Harbor District held political subdivision of the State of California); *New Jersey Turnpike Authority*, 33 LRRM 1528, April 16, 1954, Administrative Decision, not officially reported (Turnpike Authority entitled to employer exemption under Sec. 2 (2)); *Int'l Brotherhood of Electrical Workers, Al J. Schneider Co.*, 87 NLRB 99, 100 (Board of Education held political subdivision of the Commonwealth of Kentucky); *New Bedford, Wood's Hole, Martha's Vineyard, etc.*, 127 NLRB 1322, 1324 (Advisory Opinion, Steamship Authority held political subdivision or instrumentality of the Commonwealth of Massachusetts); *Civilian Cafeteria Board*, 106 NLRB 208 (Cafeteria Board held agency of the United States). Cf. *National Food Corp.*, 88 NLRB 1500, 1501 (Pentagon Post Restaurant held government agent, but management services performed by National Food Corporation found to entail employer controls bringing corporation itself within coverage of the Act). See, also, *Creekmore* v. *Public Belt R.R. Comm'n of*

simply exercised certain regulatory controls over an essentially private operation, the claim of immunity has been denied. *Randolph Electric Membership Corp.*, 145 NLRB No. 79, pending on petition for enforcement with a companion case, *Tri-County Electric Membership Corp.*, 145 NLRB No. 10, (C.A. 4), Nos. 9437, 9438; *Middle Dept. Assoc. of Fire Underwriters*, 122 NLRB 1115; *Toledo Board of Trade*, 117 NLRB 1504, 1506–1507.

Under these precedents, the County, in its operation of the transit system, is entitled to the immunity conferred by Section 2(2). It possesses the relevant controls over employment conditions and labor relations, and does not share them with Pawley (see *supra*, pp. 7–8). Moreover, the County is a political subdivision of the State and operates through publicly elected officials, and the Transit Authority was directly created by the County.

There is no merit to the Union's argument (Pet. 25–26) that the specific exclusion for "any wholly owned Government corporation" indicates that immunity is not afforded where government shares "ownership controls" with private persons, as here. As noted (n. 11, p. 15, *supra*), that provision,[17] which was added in 1947, was designed to make clear that the exemption in Section 2(2) extended to such gov-

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New Orleans, 134 F. 2d 576, 577–578 (C.A. 5), certiorari denied, 320 U.S. 742.

[17] The provision appears to reflect the rule of such early decisions as *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 398, 399, that a private corporation does not acquire governmental status just because the government grants it a charter or owns some of its stock, *infra*, p. 23.

ernmental entities as TVA or RFC, but did not include an essentially private corporation merely because the United States happened to own some stock therein. The present situation is not analogous to that in which the government merely holds stock in a private corporation. Here, the government ownership is total rather than partial. The County holds title to all transit system assets, and, although Pawley and the other bondholders have power to mature the bonds should the County default or breach the covenants of the Trust Agreement, they have no ownership interest in the Transit System assets; rather, the interest of the bondholders, including Pawley, is essentially merely that of a preferred creditor.[18] Cf. *Reconstruction Finance Corporation* v. *Merryfield,* 134 F. 2d 998, 991–992 (C.A. 1), where the financial in-

[18] Contrary to the Union (Pet. 8–9), the power of the bondholders to call up all the bonds in the event of a default and to institute, through the trustee, suits for specific performance of the covenants of the Trust Agreement does not give Pawley a right of reversion in the Transit System upon default in the bond payments or breach of the covenants of sound operation. Under the Agreement for Delivery of Possession, Pawley is deemed to have relinquished full ownership of the Transit System and its assets to the County and is remitted solely to the rights of a bondholder. Although the bonds issued entitled Pawley and the other bondholders to a first lien on the transit revenues for payment of the bond principal plus interest, they specifically recite that they are not to be "construed * * * as conveying or mortgaging the Transit System or any part thereof." See p. 4, *supra*, and the discussion of such provisions in Fordham, *Revenue Bond Sanctions,* 42 Col. L. Rev. 395, 431, 433, and Nehemkis, *The Public Authority: Some Legal and Practical Aspects*, 47 Yale L. J. 14, 23–24. See, also, *State* v. *Dade County*, 142 So. 2d 79, 88 (S.Ct. Fla.) validating the Transit Revenue Bonds.

terest and control of the RFC in the affairs of a shoe corporation was held not to create an employer-employee relationship within the coverage of the Fair Labor Standards Act.[19]

The cases relied on by the Union do not require a contrary conclusion. In *Bus Employees* v. *Missouri*, 374 U.S. 74, the Court held that the State could not, through its strike seizure procedure, defeat the Section 7 right of public utility employees to strike. However, the Court emphasized that (374 U.S. at 81):

> * * * the State's involvement fell far short of creating a state-owned and operated utility whose labor relations are by definition excluded from the coverage of the National Labor Relations Act. The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual management of the company, and there was no change of any kind in the conduct of the company's business. * * *

Here, on the other hand, the employees of the transit system became County employees, the County paid

[19] In any event, even if the trust for the bondholders could be analogized to a corporation in which the bondholders participate as shareholders with the County, by virtue of their right to receive interest and to enforce the covenants protecting the security of their investment, any waiver of the County's immunity which could be inferable from its joint participation therein (cf. *Planters' Bank*, pp. 23–24, *infra*) would appear to be applicable only to proceedings against the trust itself, which is certainly not an employer under the Act.

their wages and supervised their duties, and the property was actually conveyed, transferred, and otherwise turned over to the County.

In *United States* v. *United Mine Workers,* 330 U.S. 258, the government seized the coal mines under an arrangement whereby it "substituted itself for the private employer in dealing with those matters which formerly were the subject of collective bargaining between the union and the operators," negotiating a new collective agreement with the union. In these circumstances, the Court held that the government became the employer of the employees, with the result that a strike could be enjoined wihout regard to the Norris-LaGuardia Act, notwithstanding that the government retained the private managers of the mines with substantially the same functions and authority as before;[20] that "none of the earnings or liabilities resulting from the operation of the mines, while under seizure, are for the account or at the risk or expense of the Government; that the companies continue to be liable for all Federal, State, and local taxes; and that the mining companies remain subject to suit" (330 U.S. at 287, 288). The governmental involvement here is far greater and has none of the temporary features present in *Mine Workers.*[21] Moreover,

[20] The Court noted that the government retained ultimate control, since its regulations provided for removal of the managers at the discretion of the Coal Mines Administrator.

[21] Cf. *Hoosier Veneer Co.*, 21 NLRB 907, 935–937, modified and enforced *sub nom. National Labor Relations Board* v. *Bachelder*, 120 F. 2d 574 (C.A. 7), certiorari denied, 314 U.S. 647, also cited by petitioner (Pet. 23–24), where a court-appointed receiver was found to be a "person acting in the interest of an employer," under Section 2(2) of the Wagner Act.

Mine Workers shows, contrary to the Union's contention, that governmental immunity is not automatically lost where the government shares some of the incidents of ownership and control with private interests.

Petitioner also relies on cases in which coverage of the States and their subdivisions is implied in the absence of any statutory exemption for such governmental entities (Pet. 21, 22, 23, 24, 27). *Parden* v. *Terminal Railway of the Alabama State Docks Department,* 377 U.S. 184, 188–189 (Federal Employers' Liability Act); *California* v. *Taylor,* 353 U.S. 553, 564–565 (Railway Labor Act). These decisions have little bearing on the issue of coverage under the National Labor Relations Act which expressly excludes from the definition of employer in Section 2(2) "any State or political subdivision thereof."[22] Similarly the language in *Bank of United States* v. *Planters' Bank of Georgia,* 9 Wheat. 398, 399, that "when a government becomes a partner in any trading company, it divests itself, so far as concerns the trans-

[22] Cf. *Plumbers' Union* v. *Door County,* 359 U.S. at 354, 358–359, and *Al J. Schneider Co.,* 87 NLRB 99, 100–101, cited by petitioner (Pet. 21–22). These cases involve the definition of "person" under Section 2(1) of the Act which does not exclude governmental entities. Thus, the question there presented was the right of political subdivisions to the protection against secondary pressure afforded "person[s]" under Section 8(b)(4). As the Board stated, in a case involving the exemption of governmental employers in Section 2(2), such holdings "are inapposite as they involve action directed against, rather than jurisdiction over, governmental agencies." *New Bedford, Wood's Hole, Martha's Vineyard, etc.,* 127 NLRB 1322, 1323–1324. See, also, *Peter D. Furness,* 117 NLRB 437, 439–441, enforced, *sub nom. National Labor Relations Board* v. *Local Union No. 313, etc.,* 254 F. 2d 221 (C.A. 3), overruling *Al J. Schneider, Co., supra.*

actions of that company, of its sovereign character, and takes that of a private citizen," is addressed to a totally different problem. As indicated, *supra*, n. 17, p. 19, the question there was simply whether a suit against a bank was a suit against the State, and thus barred under the Eleventh Amendment to the Constitution, because the State had issued incorporation papers to the bank and owned some of its stock. The Court held that those circumstances were insufficient to cloak the corporation with the sovereignty and immunities of the State. Here, on the other hand, the question is not whether a private corporation acquires governmental immunity because the government is a participant,[25] but, rather, whether the government itself loses its immunity with respect to an enterprise which it wholly owns, and exercises employer control over, merely because, instead of paying cash for the assets, it buys on the installment plan and accords the bondholders certain financial controls as security for the debt owed them.

4. The decisions requiring State courts to stay their hand in matters "arguably" within the jurisdiction of the Board are inapposite here. The underlying facts are not disputed and the issue is the scope of the statutory exemption for governmental employers. The

[25] Cf. also the cases cited at p. 24, n. 10 of the petition. Compare *Emergency Fleet Corp., United States Shipping Board* v. *Western Union Tel. Co.*, 275 U.S. 415, 422–423, 425–426 (Pet. 24) with *Sloan Shipyards* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567–568 (Pet. 22) for the differing treatment that a claim of sovereign privilege by a wholly owned government corporation may receive in different contexts. See the express exemption accorded "wholly owned Government corporation[s]" in Section 2(2) of the Act.

General Counsel—whose decision bars the Board from taking jurisdiction—has declined to act on the express ground that the employer in suit is outside the scope of the Act. And, with the benefit of the fully developed record here, the Board itself has now expressed its view to the same effect. Whatever the "arguability" of the question when the Florida courts first asserted jurisdiction, it is now the Board's considered submission that they did not invade a pre-empted area. Cf. *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 755–756.

In closing, we note that the Board is not aware of any similar case in which the present question is presented.

CONCLUSION

For the foregoing reasons, the Board believes that the Florida courts correctly concluded that the transit system operated by Dade County was removed from the National Labor Relations Act by the governmental exemption in Section 2(2).

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 388

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, *Petitioner,*

v.

DADE COUNTY, a political subdivision of the State of Florida, and the METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, a governmental entity of Dade County, Florida, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY OF PETITIONER TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AND TO BRIEF FOR RESPONDENTS IN OPPOSITION

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1. The basic issue is now sharply focused. Where, as here, a political subdivision is bound, financially and operationally, by detailed, explicit, terms of a Trust Agreement, judicially enforceable by a private party, and where the subdivision cannot without that party's consent remove the Trustee, the consulting engineers, or

the management company, who actually conduct the operation, is the enterprise exempt from the National Labor Relations Act because the transaction is labelled a "purchase and sale"?

The Board admits (Memo., p. 19), that Congress could not conceivably have intended the Section 2(2) exemption to apply to an "essentially private operation." It contends, however, that it is enough to transform a private operation into a public one to label the transfer a "purchase and sale." But determination whether a transaction is a "purchase and sale" does not answer the question whether the operation is, in essence, public or private. That depends on whether "ultimate control" of the operation is actually in public or in private hands, not merely, as the Board seems to assume, (Memo., p. 20, n. 18), on whether the "seller" retains "a right of reversion."

The Board refuses to look behind the contracting parties' self-serving declarations that Pawley "relinquished full ownership of the Transit System and its assets to the County" (Memo., p. 20, n. 18). Its self-imposed blindness is an open invitation to deals in which private ownership or control is "concealed or camouflaged or obscured by a smokescreen" of Government ownership and operation to "shackle, eliminate or extirpate collective bargaining." *Tate v. Pennsylvania Transportation Co.,* 410 Pa. 490, 497, 498, 190 A. 2d 316, 319, 320.

The Board's insistence that the labels alone tell the story (Memo., pp. 4, 12-13, 20, 24), contrasts sharply with the Florida courts' finding (Pet. A-15) despite the parties explicit disclaimer (Pet. p. 7), Pawley in fact does have substantial "financial and managerial control".

If collective bargaining, at least in public utilities, is to survive the Board must be reminded that the "conventions of the parties do not determine in the eyes of the law the rights of third persons. *Brady* v. *Roosevelt S.S. Co.*, 317 U.S. 575, 583." *Hust* v. *Moore-McCormack Lines*, 328 U.S. 707, 736 (Mr. Justice Douglas, concurring).[1] Wherever such private control as the Florida courts here found exists in fact, federal law must shield the interest of employees in collective bargaining against sham disclaimers and other "legal paraphernalia which inventive genius" (*Helvering* v. *Clifford*, 309 U.S. 331, 334), may construct. Cf. *Wiley & Sons* v. *Livingston*, 376 U.S. 543, 549.

In exempting government as employer under Section 2(2), Congress obviously had in mind only full fledged and unconditional operations by government. Congress re-emphasized this recently in the Urban Mass Transportation Act of 1964, 78 Stat. 302, when it conditioned availability of funds for acquisition of private mass transportation utilities upon preservation of "collective bargaining rights" (Memo., p. 12). If Congress was concerned with preservation of collective bargaining in transportation utilities which government would, upon acquisition, wholly own and control, *a fortiori*, the Section 2(2) exemption cannot be read as sanctioning extirpation of collective bargaining in utilities which government does *not* wholly own and control.

The Board overlooks that the right to strike is denied "traditionally" (Memo., p. 15), only to

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[1] 3 Jones, *Chattel Mortgages and Conditional Sales* (Bowers Ed.), § 965, pp. 70-71; *United States* v. *Silk*, 331 U.S. 704, 713; *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729; *Bartels* v. *Birmingham*, 332 U.S. 126, 128-129.

employees of enterprises which are wholly government owned and operated. *United States* v. *Mine Workers,* 330 U.S. 258, 319-321, 328-329. Only such enterprises have "none of the peculiar characteristics of a private enterprise maintained for purposes of private gain." *Miami Water Works, Local 654* v. *City of Miami,* 157 Fla. 445, 26 So. 2d 194; *Norwalk Teachers Ass'n* v. *Board of Education,* 138 Conn. 269, 83 A. 2d 482; *Nutter* v. *City of Santa Monica,* 74 A.C.A. 331, 168 P. 2d 741. And it is only such enterprises, therefore, which are granted exemption from collective bargaining requirements, because only where the private profit motive is entirely absent can Government consider the welfare of its employees in terms of the public interest alone. The presence of a private profit interest makes it impossible for Government as "employer" to function "*exclusively* for the benefit of the State." (Emphasis added.) *International Longshoremen's Association* v. *Georgia Ports Authority,* 217 Ga. 712, 124 S.E. 2d 733, 735, cert. denied, 370 U.S. 922.

2. The Board's insistence that the Section 2(2) exemption is operative wherever Government has "employer controls" (Memo., pp. 15, 19), invites political subdivisions to circumvent Congress' prohibition of the use of government power to destroy collective bargaining and the right to strike by assuming the ostensible status of "employer" and regulating wages, hours and working conditions through civil service laws. This result cannot be reconciled with *California* v. *Taylor,* 353 U.S. 553, 559-561, 566-567; which explicitly recognizes that restrictions imposed by civil service laws are as antithetical as compulsory arbitration to pro-

tected collective bargaining. (But, Cf. Cox and Seidman, *Federalism and Labor Relations,* 64 Harv. L. Rev. 211, 240-241 (1950)).

The Board's equation of the exemption with the possession of "employer controls" assumes that the term "employer" as used in the Act refers to the legal entity which possesses such controls. Congress had an entirely different idea. In Section 1 of the Act, Congress spoke of "employers" as persons "who are organized in the corporate or other form of ownership association." The "inequality of bargaining power" which Congress moved to redress is inequality between persons *so organized* and employees, for it is that inequality which "tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry." Accordingly, the term "employer" has been construed to refer not to any particular legal entity but to the industrial enterprise in which employees work. "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." *NLRB* v. *Colten,* 105 F. 2d 179, 183 (6th Cir.), followed in *Hoosier Veneer Co.,* 21 NLRB 907, 928-929, 932-933, 935-937, enf'd 120 F. 2d 574, 576, 579 (7th Cir.), cert. denied, 314 U.S. 647.

Therefore, the starting point for inquiry is whether the employing enterprise is covered. The answer must turn on whether *any* of its owning or controlling entities is private. If any one is, the enterprise must be covered, lest Congress' policy "be defeated by the fragmentation of an integrated business into a congeries of entities." *Bowater Steamship Co.* v.

Patterson, 303 F. 2d 369, 373 (2d Cir.), cert. denied, 371 U.S. 680.

The Board's *ipse dixit* to the contrary notwithstanding (Memo., p. 21, n. 19, Br. in Opp. p. 32), the Transit Trust, not Dade County, is the "employing industry," and therefore the "employer" within the meaning of Section 2(2), for the Trust, not Dade County, has "the obligation to bear the financial burden of [employees'] wages and the receipt of the benefits of the hours worked." *Labor Board* v. *Atkins & Co.,* 331 U.S. 398, 414.

In its capacity as trust participant, Dade County is certainly subject to the Board's remedial power under Section 10(a), "to prevent *any person* from engaging in any unfair labor practice." As defined in Section 2(1), and as heretofore applied, the term "person" as used in Section 10 includes government entities. *Hoosier Veneer Co., supra.* The Board's refusal to apply Section 10 to political subdivisions despite *Plumbers Union* v. *County of Door,* 359 U.S. 354 (Memo., p. 23, n. 22; cf. Br. in Opp., pp. 32-33), emphasises the need for intervention by this Court.

The Board's theory that "divestiture" affects only coverage of the enterprise and not of the government qua participant therein (Memo pp. 23-24; Br. in Opp., pp. 31-32) is refuted by the very language the Board quotes. In any event, the purported distinction is irrelevant for if the Government's immunity survives in a joint venture, exclusion of the venture itself, as the Board argues, necessarily follows. That is precisely why the law finds it indispensable to impose coverage upon an exempt party in the context of a joint venture with one not exempt. *Burton* v. *Wilmington Parking*

Authority, 365 U.S. 715, 724, and cases cited in our Petition, pp. 22-25.

Moreover, the Board overlooks the reason the divestiture rule *is* "one of the first principles of our system of law" (Pet., p. 22). In a democracy, government immunity may properly extend only to "the sovereign." *Mine Workers* case, *supra*, 330 U.S. at 272. The *sine qua non* of sovereignty is independence of private control.[2] Therefore, in the context of an enterprise or operation in which it submits to judicially enforceable private control, Government cannot claim sovereignty.

The Board's contention that *Mine Workers* shows "that governmental immunity is not automatically lost where the government shares some of the incidents of ownership and control with private interests" (Memo., pp. 22-23; Br. in Opp., pp. 43-44), stands that case on its head. Three of the Justices who composed the five-member majority explicitly pretermitted the administrative regulation the Board quotes (330 U.S. at 288), and the two others pronounced it invalid (330 U.S. at 329). The premise of adjudication was that during seizure the Government had "full title *and* ownership" (Emphasis added), as well as "ultimate control." 330 U.S. at 284-285, 288.

Since Dade County made no investment and assumed no obligation to make any, and since the Trust

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[2] "The power to have the last word in any dispute is just what sovereignty is." Cohen, Morris Raphael, *Reason and Nature* (The Free Press, Glencoe, Ill., 1953 ed.), p. 397; Holdsworth, W.S., *Some Lessons From Our Legal History* (MacMillan, N.Y., 1928), pp. 122, 143; Cohen, Hymen Ezra, *Recent Theories of Sovereignty* (U. of Chicago Press, 1937), p. 15; Cohen, Morris Raphael, *Reason and Law* (The Free Press, Glencoe, Ill., 1950), p. 115; Bliss, *Sovereignty* (Little, Brown & Co., Boston, 1885), p. 7.

will not terminate unless and until the County has paid the full purchase price of the assets in cash, the transit operation obviously is not now being conducted for "the account * * * risk or expense" of the County, and the County has no "ultimate control." Thus, the Government "involvement" postulated in *Mine Workers* is entirely absent here. In addition, legislative developments since *Mine Workers* clearly show Congressional disapproval of exemption, even on the premises postulated in that case, where "involvement" is intended to be temporary. (Pet., p. 22). Accordingly, to qualify for exemption now, Government involvement must be both permanent and total.

The theory that Government exercise of "employer controls" is *ipso facto* exempt stems from *Tampa Shipbuilding* (Memo., p. 17), a case decided in 1945, two years before *Mine Workers*. The Board justifies clinging to the *Tampa* approach, despite incompatability with *Mine Workers*, on the theory that the government exemption was merely implied in the Norris-LaGuardia Act whereas in the Wagner Act it is "express" (Memo., p. 23). The short answer is that expression was intended merely to insure that the "traditional" exemption, which is sometimes but by no means always, implied (compare *United States* v. *United Mine Workers*, 330 U.S. 258, 272-274, with *California* v. *Taylor*, 353 U.S. 553, 564-565, and *Pardon* v. *Terminal R. Co.*, 377 U.S. 184, 188-189), would attach. It is inconceivable that Congress intended to enact a different scope of Government immunity in contemporaneous statutes so similarly conceived. Compare *Mine Workers* case, *supra*, 330 U.S. at 274, with *Hearst* case, *supra*, 322 U.S. at 126. See also, Brief for the

United States as Amicus Curiae in *Local Union 189 v. Jewel Tea Company*, No. 240, this Term, pp. 21-22. Explicitness, therefore, establishes no more than the draftsman's preference for clarity.

Moreover, the *Tampa* approach is incompatible with the Board's concession (Memo., p. 19), that immunity should not attach where Government exercises "regulatory controls over an essentially private operation." For, if unfettered control over labor relations establishes the right to immunity, there is no room for inquiry whether the operation, as such, is private or public.

3. The Board concedes (Memo., pp. 15, 19), that Congress could not have intended to exclude employees whose wages are controlled by a private investor. Yet it would exclude employees of the Transit Trust because Pawley's power to veto wage increases which jeopardize his profits gives him indirect rather than direct control over their wages (Memo., p. 13). But if Pawley has *any* "power to determine * * * wages" (*Labor Board* v. *Atkins Co.*, 331 U.S. 398, 413), the form of its exercise is quite irrelevant. The Board's reliance (Memo., pp. 7-8, 15, 19), upon Pawley's cession to the County of control over hiring and firing and details of work performance is entirely misplaced. As this Court said in the *Atkins* case, *supra*, at 413-414:

> "* * * it matters not that respondent was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. As we have seen, judgment as to the existence of such a relationship for purposes of the Act must

be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker. . . ."

4. Finally, the Board misconceives the parties' "conventions." It stresses (Memo., p. 4), the language which provides that the bonds are not to be "construed * * * as conveying or mortgaging the Transit System," but it ignores the succeeding clause (Pet. p. 8), which provides that "nothing * * * shall be construed * * * to create any debt against the County." Indisputably, the financial "obligations" of the County and the Transit Authority are all contingent on profits. Absent profits, the County need not even pay "interest." A promise to buy *if* there are sufficient future profits is *not* a purchase "on the installment plan" (Memo., p. 24). A transfer pursuant to such a promise is a trust, not a purchase and sale.

In reality, Pawley's transfer of title and possession to the County marked "no diminution in the value of his estate"; rather, his diversion of a portion of the future income to the County in exchange for the labor relations and tax advantages accruing from sovereign immunity reflects "the procuring of a satisfaction which is procurable only by the expenditure of money or money's worth. The enjoyment of the economic benefit accru[es] to him." *United States* v. *Anderson*, 132 F. 2d 98, 100, 101 (6th Cir.). Therefore, before the transit system has been fully paid for, as a matter of federal law, "it is still his * * *." *Todd* v. *Vestermark*, 145 Cal. App. 2d 374, 377, 302 P. 2d 347, 350.

But even assuming arguendo that the contracting parties' "conventions" made Pawley's position technically "that of a preferred creditor" (Bd. Memo., p. 20), the extent of his retained control would nevertheless leave the enterprise legally his.[3] "The point at which the creditor becomes a principal is that at which he assumes *de facto* control over the conduct of his debtor, whatever the terms of the formal contract with his debtor may be." *Restatement of Agency* (Second), Ch. 1, p. 81.[4] Even if "it was not intended that [Pawley] * * * should control or interfere with the [transit] business otherwise than as a mere creditor [i]t is impossible to consider [the arrangements between the parties] without being convinced that their legitimate effect [is] to enable [Pawley] to control the business." *Poundstone* v. *Hamburger*, 139 Pa. 319, 325, 20 A. 1054, 1055.[5]

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[3] 1 *Thompson on Real Property* (1939 Ed.), Ch. 2, Sec. 40, pp. 35, 36, 37; 1 *Powell on Real Property* (Bender, 1949), pp. 27-29; *Ballantine on Corporations* (1946), pp. 12-13. *Crane on Partnerships* (1935) § 19, pp. 16 ff.

[4] *Pougner* v. *First Natl. Bank*, 141 Ill. 124, 131, 30 N.E. 442, 444; *San Joaquin Light & Power Corp.* v. *Costaloupes*, 96 Cal. App. 322, 334, 274 P. 84, 89; *Hackett* v. *Stanley*, 115 N.Y. 625, 633, 22 N.E. 745, 748; *Spaulding* v. *Stubbings*, 86 Wis. 255, 261-265, 56 N.W. 469, 471-472.

[5] That Pawley may have retained control only to liquidate his investment is irrelevant. *Furnace Run Sawmill & Lumber Co.* v. *Heller Bros.*, 84 Ohio 201, 95 N.E. 771, 772; *Purvis* v. *Butler*, 87 Mich. 248, 252-259, 49 N.W. 564, 567. Nor does limitation of the return above principal to five per cent, and its description as "interest," make Pawley any less an entrepreneur. *Coale* v. *Societe Co-operative*, 21 F. 2d 180, 181 (S.D.N.Y.). Profits of public utilities are universally limited to a percentage of invested capital. See Cohen, Morris Raphael, *Property and Sovereignty*, 13 Cornell L.Q. 8, 13 (1927).

5. The Board's admission (Memo., p. 24) that "the issue is the scope of the statutory exemption for governmental employers" highlights both its importance and the necessity of early resolution by this Court. The claim that coverage is no longer "arguable" because the Board has "now expressed its view" (Memo., p. 25), is incompatible with *Interlake's* holding, 370 U.S. at 185, that even a Board "decision is not the last word," but only "the first." *A fortiori,* a mere expression of "views", arrived at *ex parte,* without notice and without hearing, and not susceptible to judicial review, cannot be the "last word." Indeed, for the Board "to improvise * * * [opinions on questions litigable before it] would appear inconsistent with the basic statutory plan * * *." Brief for the United States as Amicus Curiae in *Local 189* v. *Jewel Tea Company,* No. 240, this Term, p. 76.

The Board is not empowered to usurp this Court's functions. *Board* v. *Hearst Publications,* 322 U.S. 111, 130-131, and cases cited. "An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369. Moreover, since the question of construction turns on the intention of Congress, not the Board's expertise, the Board's opinion is entitled to no particular weight. *Plumbers' Union* v. *County of Door,* 359 U.S. 354, 358, n. 10; *Office Employes Union* v. *NLRB,* 353 U.S. 313, 320; *Hotel Employees* v. *Leedom,* 358 U.S. 99; *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10, 18-22; *NLRB* v. *Highland Park Co.,* 341 U.S. 322, 325-326; *NLRB* v. *Coca-Cola Bottling Co.,* 350 U.S. 264, 267-269.

Under *Garmon* and *Interlake* the bar against State power will persist unless and until this Court decides

on the merits against coverage. Opposition to this result is reminiscent of the Board's similar attempt to defeat preemption in *Fairlawn, Garmon* and *Guss.* Brief for the NLRB as Amicus Curiae in Nos. 41, 50, 280, October Term, 1956.

If the Board is in error on the coverage issue, its position amounts to usurpation of "the congressional power of repeal." *Office Employes Union* v. *NLRB,* 353 U.S. 313, 320. For redress of administrative nullification, we must look to this Court. *I.C.C.* v. *Humboldt Steamship Co.,* 224 U.S. 474, 484-485; *Stark* v. *Wickard,* 321 U.S. 288, 310; *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 622-623; *New Jersey* v. *United States,* 168 F. Supp. 324, 334-335 (D. N.J.), aff'd, per curiam, 359 U.S. 27.

CONCLUSION

For the foregoing reasons, in addition to those heretofore set forth, the petition for writ of certiorari should be granted.

Respectfully submitted,

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